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In 1889 the legislature of Missouri passed an act making debts due for labor preferred claims against the property of the employer when seized by creditors or when his business has been placed in the hands of a receiver or trustee, and which requires servants to present their claims under oath to the officer or court holding such property, within ten days after its seizure on execution or attachment, or within thirty days after taking by the receiver or trustee, and directs payment first of such claims from the proceeds of the property unless exceptions to their allowance shall be filed, in which case the claimants shall be required to reduce their claims to judgment. The validity of the act has been recently passed upon by the supreme court of that State. Hennig v. Staed, 40 S. W. Rep. 95. It was contended by those opposed to its enforcement that it is obnoxious to the section of the constitution which provides "that no person shall be deprived of life, liberty or property without due process of law," in that it authorizes the court or officer in charge of the property of an insolvent debtor to pay labor claims without notice to parties interested therein and without giving them a hearing or an opportunity to be heard. While the court concurred with the general contention that no one can be deprived of his property without an opportunity to be heard, a principle which is fundamental, and that taking the property of an employer to pay the claims of his employees upon their mere sworn statement without notice and without giving him an opportunity to contest their correctness, would certainly be taking their property without due process, yet that in order to secure to the debtor an opportunity to be heard, they declared, that it is not essential that the proceedings should be according to the course of the common law. It is competent for the legislature to prescribe a summary and inexpensive proceeding for enforcing such claims, and in the case of laborers whose services have enhanced the value of the property of their employer, whose demands are small and who live and support their families upon the wages earned, it is especially just that some manner of proceeding should be provided by which they can secure their rights promptly and without having to resort to the slow and expensive procedure provided by the general law. By this statute, in the view of the supreme court, the legislature undertook to accomplish that purpose.

The statute gives a preference to laborers only after the property of the employer has gone into the hands of the court, an officer of the court, or a trustee, for the purpose of being subjected or applied to the payment of his debts. The statute impresses upon the property a priority in the nature of a lien, in favor of the laborers. The property is in the hands of the court, the officer, or trustee for administration. The proceeding of the claimant, as provided, is against the property, rather than the creditor. After the seizure or transfer of the property, others besides the owner have interests in it. It would in many cases be almost, if not altogether, impracticable, to give each interested party personal notice of the claim. In such a case a substituted notice to all persons interested may be provided. The legislature has a large discretion in respect to the manner of giving such notices; and where a kind of notice has been provided, by which it is reasonably probable that the party interested will be appraised of what is contemplated, and an opportunity afforded him to defend, courts should not pronounce the proceedings illegal.

A substituted service is provided by statute for many such cases, generally in the form of a notice, published in the public journals, or posted, as the statute may direct; the mode being chosen with a view to bring it home, if possible, to the knowledge of the party to be affected, and to give him an opportunity to appear and defend. The right of the legislature to prescribe such notice, and to give it effect as process, rests upon the necessity of the case, and has been long recognized and acted upon. As supporting such service the court called attention to *In re* Empire City Bank, 18 N. Y. 199; Jones v. Driskill, 94 Mo. 19, and Cooley Const. Lim. 497.

The statute provides: "Any such laborer or servant desiring to enforce his or her claim for wages under this chapter, shall present a statement under oath, showing the amount due after allowing all just credits

and set-offs, the kind of work for which such wages are due, and when performed, to the officer, person or court charged with such property, within ten days after the seizure thereof or any execution or writ of attachment, or within thirty days after the same has been placed in the hands of any receiver or trustee." Every person interested in the property of the debtor is presumed to know the preferred right of the laborer or servant, and the course to be pursued by him in order to enforce his claim. The time within which the statement is to be filed is limited to thirty days. The statement gives full information to all persons interested. The officer or person in charge frequently represents both debtor and creditor. Persons interested would naturally seek information from the files of the court, or from the officer or person in charge of the property. "It seems to us," says the court, "that a more effectual notice could not have been provided."

NOTES OF RECENT DECISIONS.

NEGLIGENCE — UNGUARDED EXCAVATION— PROXIMITY TO HIGHWAY.—In Daneck v. Pennsylvania R. Co., 37 Atl. Rep. 59, decided by the Court of Errors and Appeals of New Jersey, a public highway was so constructed that it terminated 20 feet west of a previously existing railway cut, the depth of which was 5 feet or more below the crown of the highway. Of the 20 feet of land between the cut and the highway, a strip 5 feet wide next to the cut was owned by the railway company, and the remaining 15 feet, next to the highway, constituted an unused strip owned by a third person. This intermediate land was a foot or more above the crown of the highway, and rose higher to the west. The railway cut was not fenced or otherwise guarded against accident to users of the highway. A, who was ignorant of the locality, accompanied by a friend, in the dark, at night, drove a horse and buggy through the highway, and up over the intermediate land, into the railway cut, where he sustained injury. It was held that no liability for the damage suffered by A attached to the railway company. It was insisted in behalf of the plaintiff that it was the duty of the defendant to have fenced or otherwise to have suitably guarded the terminus of the street against the railway cut, and that, because of its failure to do so, the plaintiff may maintain his action. The doctrine invoked is that an unguarded excavation upon land outside a public highway, but so near it as to endanger those who pass along the way in the exercise of ordinary caution, is a public nuisance, from which may spring a right of action to one who suffers individual injury therefrom. The doctrine appears to be recognized by the weight of authority (Barns v. Ward, 9 C. B. 392; Beck v. Carter, 68 N. Y. 283; McAlpin v. Powell, 70 N. Y. 126, 133; Association v. Giles, 33 N. J. Law, 260, 264; Vanderbeck v. Hendry, 34 N. J. Law, 467, 471; City of Norwich v. Breed, 30 Conn. 535; Wood, Nuis. § 271; Ray, Neg. Imp. Dut. 26; Elliott, Roads & S. 542; and the cases hereafter cited), although it seemingly has not the approval of the Supreme Court of Massachusetts. Howland v. Vincent, 10 Metc. (Mass.) 371; McIntire v. Roberts, 149 Mass. 450, 22 N. E. Rep. 13. The Supreme Court of New Jersey, in the case of State v. Society for Establishing Useful Manufactures, in its decision upon motion to quash the indictment, which is reported in 42 N. J. Law, 504, accepted the doctrine broadly as to excavations made after the construction of the highway; but in its decision in the same case, upon the rule to show cause why there should not be a new trial (44 N. J. Law. 502), held that the doctrine was not applicable in the case of a highway dedicated after the making of the excavation, for in that case the dedication was accepted by the public subject to the existing adjacent excavation, and the duty to protect it became a duty of the public, and limited its decision to that point.

The New Jersey court did not consider it necessary in the disposition of the present case that any opinion shall be expressed as to the tenability of the doctrine invoked. Assuming its correctness for the purpose of disposing of this case, it is observed that an essential requisite to the defendant's liability and limitation of the doctrine is that the unguarded excavation shall be so near the highway as to endanger those who use the way with reasonable care. What is meant by such proximity is well defined in the follow-

ing quotation from the opinion in Hardcastle v. Railway Co., 4 Hurl. & N. 67, 28 Law J. Exch. 139: "When an excavation is made adjoining a public way, so that a person walking on it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage, who might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different. We do not see where the liability is to stop. A man going off a road on a dark night, and losing his way, may wander to any extent; and, if the question be for the jury, no one can tell whether he was liable for the consequences of his acts upon his own land or not. We think the proper and true test of legal liability is whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise, and if in every case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous." The decision was put upon the principle of Blyth v. Topham, Cro. Jac. 158, 1 Rolle, Abr. 88, where it was held that if A, seised of a waste adjacent to a highway, digs a pit in the waste, within 36 feet of the highway, and the mare of B escapes into the waste, and falls into the pit, and dies there, B shall not have an action against A, because the making of the pit in the waste, and not in the highway, was not any wrong to B, but that it was the default of B himself that his mare escaped into the waste. In the case of Hounsell v. Smyth, 7 C. B. (N. S.) 731, the allegation of the declaration was that an unguarded quarry was situate near to and between two public highways in a waste, and that it was dangerous to persons who might accidentally deviate or stray from the highways or intentionally cross the waste from one to the other, and it was held, as the danger was not alleged to the persons passing along either highway, but to persons who might accidentally deviate or stray from or intentionally leave the ways, that no duty to guard the quarry appeared, and, therefore, that no liability for the injury complained of existed. See also, Binks v. Dun Co., 3 Best. & S. 244.

CRIMINAL LAW—LARCENY FROM THE PERSON.—In People v. McElroy, 48 Pac. Rep. 718, decided by the Supreme Court of California it was held that stealing money from trousers folded and placed under the owner's head as a pillow, while he slept, did not constitute a taking "from the person," within the definition of grand larceny. On this point the court said:

The question is whether these facts show a taking "from the person," under our statute, which makes the offense grand larceny, without regard to the amount stolen, "when the property is taken from the person of another." If it was not such taking, the amount was insufficient to constitute any greater offense than that of petit larceny. Pen. Code, secs. 487, 488. The stealing of property from the person has been from an early period, under the English statutes, treated as a much graver and more henious offense than ordinary or common theft—partly by reason of the ease with which it could be perpetrated and the difficulty of guarding against it, and partly because of the greater liability of endangering the person or life of the victim. The same general reason and purpose animate the modern statutes, including our own, and, as in England, the offense is made punishable as a felony. The difficulty has been in defining with precision in all cases what constitutes a taking from the person, and this has given rise to some confusion in the authorities on the question as to whether the property must be actually on or attached to the person, or merely under the eye or within the immediate reach, and so, constructively, within the control, of the owner. According to Mr. Bishop, "The thing taken must be under the protection of the person, but need not be attached thereto." 2 Bish. Cr. Law, 898. But the only case he cites in support of the text is Reg. v. Selway, 8 Cox Cr. Cas. 235, where the indictment was for robbery, and the facts clearly show that offense, and not larceny; the prosecutor being attacked while in his room, and struck violently on the head by one of the prisoners, while the other went to a cupboard in the room and stole a cash box, Mr. Bishop suggests, tentatively, that "probably in this particular the rule in robbery applies." But he cites no case in support of the suggestion, and we think the authorities are against it. Thus, in Rex v. Hamilton, 8 Car. & P. 49, where a man went to bed with a prostitute, putting his watch in his hat on a table, and the watch was stolen by the woman while he slept, it was held that the offense was larceny from the house, and not from the person. So, in Rex v. Taylor, Russ. & R. 418, where the defendant invited an acquaintance to share his room and bed for the night, and then stole his guest's watch from the bed-head, it was deemed by the judges not a larceny from the person. See also Owen's Case, 2 East, P. C. 645; Castledine's Case, *Id.* 645, 646, and Watson's Case, *Id.* 680, 681. In Com. v. Smith, 111 Mass. 429, it was held that where the prosecutor went to bed, leaving his clothes on a chair, and the defendant, lodging with him, took a key from a pocket of the clothes and opened the prosecutor's trunk, and took money therefrom, it was larceny from the house, and not from the

person. And where a man, with his money in a satchel, went into a bank, and placed the satchel temporarily on the counter, within two feet of him, while he transacted his business, and his attention was distracted for a moment by one of the defendants while the other abstracted the money, the Supreme Court of Georgia considered that the larceny was from the house, and not from the person. Simmons v. State, 73 Ga. 609.

In view of these authorities, and the origin of the statute, we think its obvious purpose was to protect persons and property against the approach of the pickpocket, the purse snatcher, the jewel abstracter, and other thieves of like character who obtain property by similar means, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession—such as clothing, apparel, or ornaments, or property or things contained therein or attached thereto, or property held or carried in the hands, or by other means, upon the person; that it was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from his person and out of his hands. Such has been the practical application and construction of this and like statutes by public prosecutors generally, as indicated by the facts of the cases which have been called to our attention. Had the legislature intended that the offense should include instances of property merely in the immediate presence, but not in the manual possession about the person, it would doubtless have so provided, as it has in defining robbery. Robbery is defined as "the felonious taking of personal property in the possession of another from his person or immediate presence," etc. (Pen. Code, sec. 211), while the requirement of this offense is that it shall be "taken from the person." Within this rule, we are of opinion that the facts did not constitute grand larceny, within the statute. The garment from which the money was taken was not at the time on the person of Shaw. It was folded up and used as a part of his bed. Had the garment alone been taken, under like circumstances, the theft could not be held to have been from the person. A man does not wear his bed as he does his clothes. The money was, therefore, no more on his person, in any proper sense, than if it had been concealed under his bed, or elsewhere about it, or left in his clothes upon a chair, or hanging on the wall. It is the frequent habit of cautious people upon retiring to place money or valuables under their pillow or between the mattresses; but property so concealed can no more be said to be upon the person of the owner than if it were placed in any other part of the room, and its taking while so placed would not constitute a larceny from the person.

ASSIGNMENT FOR BENEFIT OF CREDITORS—FOLLOWING TRUST FUNDS.—In Drovers' & Mechanics' Nat. Bank v. Raller, 37 Atl. Rep. 30, it is decided by the Court of Appeals of Maryland, that money collected by a broker's assignee for the benefit of creditors from sales made by the broker belongs to the consignor for whom the sales were made, where the check sent by the broker therefor was dishonored and that no lien exists on assets in the hands of an assignee for the benefit of creditors for trust funds used by the insolvent in paying debts, and which did not go to swell the fund sought to be charged. The court says in part:

The general doctrine in relation to the right of the owner of property or the *cestui que trust* to follow and reclaim his property is, we think, thoroughly settled. The early English cases only went to the extent of holding that the owner of property intrusted to an agent, factor, or trustee could follow and retake his property from the possession of such agent, factor, or trustee or others in privity with him, whether such property remained in its original, or had been changed into some different or substituted, form, so long as it could be ascertained to be the same property, or the product or proceeds thereof, unless the superior rights of *bona fide* purchasers for value and without notice had intervened; but that such right of reclamation ceased when the means of ascertainment failed, as when the subject of the trust was money, or had been converted into money, and then mixed and confounded in a general mass of the same description, so as to be no longer divisible or distinguishable. The more recent rule, however, in England, as to following trust moneys, is broader, and goes to the extent of holding that, if money held by a person in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands; and that, if a person who holds money in a fiduciary character pays it to his account at his banker's, and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner, the drawer must be taken to have drawn out his own money in preference to the trust money. Knatchbull v. Hallett, 13 Ch. Div. 696. This court, in Englar v. Offutt, 70 Md. 78, 16 Atl. Rep. 497, following closely the Supreme Court of the United States in Central Nat. Bank v. Connecticut Mut. Life Ins. Co., 104 U. S. 54, has announced the same principles. But it is now insisted that the doctrine has been expanded and amplified, and that, though the funds cannot be traced or identified, a lien still exists upon the debtor's general assets in the hands of his trustee in favor of the owner or *cestui que trust* whose property or money has been mingled with that of the fiduciary, and has been used by him in liquidating other claims against himself; and that this lien is a preferential one over other creditors of the debtor. The theory upon which this supposed enlarged doctrine rests is that, inasmuch as the wrongful application of the trust funds reduces the general indebtedness of the fiduciary, his assets, swelled to the extent of that reduction, ought to be impressed with a trust or lien in favor of the person whose money or property has been improperly employed and used to discharge the individual indebtedness. There are some cases which support this view. People v. City Bank of Rochester, 96 N. Y. 32; McLeod v. Evans, 66 Wis. 401, 28 N. W. Rep. 173, 214; Francis v. Evans, 69 Wis. 115, 33 N. W. Rep. 93; Bowers v. Evans, 71 Wis. 133, 36 N. W. Rep. 629. Harrison v. Smith, 83 Mo. 210, and some others. But it is obvious, even if these cases were not opposed to the general principles already alluded to, and even if they had not been questioned, and some of them flatly overruled, that they proceed upon a wholly fallacious and untenable theory. They are founded upon the assumption that the misapplication of th

trust funds by the fiduciary to the payment of his own debts actually swells the volume of his assets. This is the introduction of a new and unsound principle into an old and well-known doctrine of equity. But, instead of such a misappropriation swelling the volume of the debtor's assets, it would merely diminish the amount of his indebtedness, and this would benefit the estate only to the extent that it increased the percentage that the other creditors would receive, provided the amount of the misappropriation were not deducted as a preferred demand. The case of People v. City Bank of Rochester, 96 N. Y. 32, which was followed in McLeod v. Evans, 66 Wis. 401, 28 N. W. Rep. 173, 214, if it can be held to support this new doctrine (for it is a brief opinion, resting on no well-defined principle), is in conflict with the more recent case of Cavin v. Gleason, 105 N. Y. 256, 11 N. E. Rep. 504, wherein it was expressly decided, in disposing of this very contention, that it was "quite too vague an equity for judicial cognizance," and that there was "no case justifying relief upon such a circumstance." McLeod v. Evans, *supra*, Francis v. Evans, *supra*, Bowers v. Evans, *supra*, determined by a bare majority of the court, were subsequently overruled in Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. Rep. 383, the opinion of the court being delivered by one of the judges who dissented in McLeod v. Evans; and those cases are consequently no longer authority even in the State of Wisconsin. In Slater v. Oriental Mills, 18 R. I. 352, 27 Atl. Rep. 443; Shields v. Thomas, 71 Miss. 260, 14 South. Rep. 84; Ferchen v. Arndt, 26 Or. 121, 37 Pac. Rep. 161; Bank v. Dowd, 38 Fed. Rep. 172; Little v. Chadwick (Mass.), 23 N. E. Rep. 1005,—the doctrine of the Wisconsin, Iowa, Kansas, Missouri and Texas cases is criticised and repudiated. The distinction between the two conditions that are presented when, first, trust funds remain in the insolvent estate, and go to swell it, and when, secondly, trust funds have been dissipated or spent and used in the payment of debts due by the fiduciary, and therefore no longer constitute a part of his estate, is a perfectly manifest one; and the fundamental error underlying the cases we have been reviewing consists in confusing or confounding these essentially dissimilar conditions, and a consequent failure to distinguish between property which may be either specifically identified as belonging to the claimant, or money traced to and remaining in the hands of the factor or trustee on the one hand, and, on the other hand, money arising from the sale of property confessedly never owned by the claimant or *cestui que trust*, or confessedly not purchased with money belonging to him. Creditors have no right to share in that which is shown not to belong to the debtor, and, conversely, a claimant has no right to take from creditors that which he cannot show to be equitably his own. But just here comes the argument that it is equitably his own, because the debtor has taken the claimant's money, and mingled it with his estate, whereby the estate is swelled precisely that much. But, obviously, as applicable to all cases, the argument is unsound. Where the property, or its equivalent, remains, there can be no contention that the claim is just and enforceable; but where it has been dissipated, and is gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In one of the cases the illustration was used by Knight Bruce of a debtor mingling trust funds with his own in a chest; and in another Sir George Jessel likened the situation to that of a debtor who had mingled trust funds with his own in a bag. Though the particular money cannot be identified, the amount is welled just so much, and the amount added belongs to the *cestui que trust*. But where all the money has been spent,—where Knight Bruce's chest or Jessel's bag is empty,—there is no swelling of the estate at all; and in such a contingency it comes to this: that a court of equity is asked to order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate, not because the creditors who are entitled to be paid out of that general estate have done any wrong, but because the debtor has been guilty of misconduct as a trustee. It comes down to the ordinary case of misfortune on the part of the claimant or *cestui que trust* whose confidence in a trustee or fiduciary has been abused. Slater v. Oriental Mills, *supra*.

But the case of Englar v. Offutt, 70 Md. 78, 16 Atl. Rep. 497, affords, in our judgment, a complete answer to the contention of D. & W. Roller as respects that portion of their claim now under consideration. In that case it appeared that John P. Shriver had been engaged in business as a merchant and manufacturer under the name and style of J. P. Shriver & Co. In May, 1883, he was appointed guardian of two infants, and received something over $10,000 belonging to them. On the day he received this money he deposited nearly all of it in the Howard Bank, to his own credit, in an account kept in the name of John P. Shriver & Co. Against this and all other credits, aggregating considerably more than double the guardianship fund, he checked and drew out, as he needed the money, the whole amount of his deposits, except the trifling sum of $48.49. In December, 1885, Edward C. Shriver became a partner of his brother, John P. Shriver. In November, 1886, the firm made a deed of assignment for the benefit of creditors, and the trustees sold all the assets of the firm, and these realized about $9,500. Thereupon the infants whose money had gone into the business of John P. Shriver filed a petition in the trust estate, claiming a priority over the other creditors of the firm in the distribution of the net proceeds of the sales of the firm's assets. After stating the general rule as we have heretofore announced it, we said: "The sole question, therefore, in every case where trust property is attempted to be traced is whether it can or cannot be identified either in its original or altered form." Then, after discussing the evidence, and showing that the whole trust fund had been drawn out, and that there was nothing in the testimony tending to show that the stock which went into the hands of the trustees had been purchased with the trust funds, the opinion proceeds: "And, such being the case, the claim of the appellants upon the fund for distribution is altogether too indefinite. At most it is but matter of conjecture, for it is impossible to say, as this case is presented, and after the great lapse of time that has occurred, whether any, or if any, what, portion of the stock of goods that passed into the hands of the assignee under the general assignment for the benefit of creditors was the product of the trust fund belonging to the appellants. . . . It is clear, therefore, that the fund now in court for distribution cannot be identified as the product of any investment of the original trust fund belonging to the appellants," who were the infants. And because this could not be done the relief sought was denied, though, had the doctrine of the Wisconsin and other cases heretofore cited been considered the law, the fund, notwithstanding the trust money had not been traced into the purchase of the firm's assets, could have been impressed with a preferential trust, and the ward's claim would have prevailed over the debts due

to the general creditors of the firm. In our opinion, then, so much of the claim of D. & W. Roller as the firm of Sheeler & Ripple actually collected before the appointment of the trustees is not entitled to a priority, because the funds had been spent or dissipated, and did not in any form go into the hands of the trustees, and therefore, as to that portion of their claim, they are simply general creditors standing on the same footing with other general creditors of Sheeler & Ripple; though, as to so much of the proceeds of the sales of the consigned hogs as the trustees have collected, and which, consequently, is capable of identification, the Rollers are entitled to a priority.

WHAT DESCRIPTION OF THE DEBT IS SUFFICIENT IN A RECORDED MORTGAGE.

The question which it is proposed briefly to consider is, what description of the debt intended to be secured, in a recorded mortgage or deed of trust, real or chattel, is sufficient as against interested third persons having no knowledge of the real facts.

Three Leading Propositions Supported by the Adjudged Law.—It is believed that the entire mass of American adjudged law relating to this question can be ranged under the following propositions:—1. That a mortgage, either of land or of chattels, given to secure an ascertained indebtedness, or an indebtedness capable of being described in general terms, must describe the indebtedness intended to be secured with as much accuracy as the nature of the case admits, or it will be deemed contrary to the policy of the recording laws and void as against interested third persons, creditors or purchasers. 2. To the contrary, that a mortgage of lands or of chattels is not void as against interested third persons, creditors or purchasers, merely because it fails to contain an accurate description of the debt, but that the debt really intended to be secured may be established by parol; but always with two provisos: (*a*) That the debt is sufficiently described in the recorded instrument to put interested third persons upon inquiry and to direct them to the true sources of information. (*b*) And that there has been no affirmative attempt to conceal and to throw interested third persons off their guard and stifle inquiry. From these statements, three round propositions may be extracted:—1. Either the debt must be described as accurately as the case admits of. 2. Or it must be described with sufficient accuracy to direct interested third persons to the true sources of knowledge, that is, to put them upon inquiry. 3. It must not have been devised so as to mislead and deceive.

I. *Doctrine that the Debt must be Described in the Mortgage with as much Certainty as the Case Admits of.*—Let me first ask the attention of the reader to a mass of adjudged law to the effect that unless the debt intended to be secured by a mortgage of land and chattels is described therein as accurately as may be, under all the circumstances of the case, it is void as against interested third persons, creditors or purchasers, as being against the policy of the recording acts.[1] The grounds on which the courts, which have taken this position, have rested the doctrine may be well disclosed by quoting from a few of the leading cases. In the leading case in Connecticut it was said: "The spirit of our recording system requires that the records should disclose, with as much certainty as the nature of the case will admit of, the real state of the encumbrance. Hence, if a mortgage is given to secure an ascertained debt, the amount of that debt must be stated. If it is intended to secure a debt not ascertained, such *data* must be given respecting the debt as will put any one interested in the inquiry upon the track leading to a disclosure. If given to secure an existing liability, the foundation of such liability must be set forth." Therefore, where the condition of a mortgage deed described the debt secured by the mortgage as a debt due from the mortgagor to the mortgagee, by note, dated the 10th of May, 1834, on demand, with interest, but without specifying the amount,—it was held that the mortgage was not a valid security as against subsequent encumbrancers.[2]

[1] The following cases affirm this proposition: Frost v. Beekman, 1 Johns. Ch. 288 (Chancellor Kent); Pettibone v. Griswold, 4 Conn. 158; Stearns v. Porter, 46 Conn. 313; Hart v. Chalker, 14 Conn. 77; North v. Belden, 13 Conn. 376; Sanford v. Wheeler, 13 Conn. 165; Bramhall v. Flood, 41 Conn. 68; Jewett v. Preston, 27 Me. 400; Follett v. Heath, 15 Wis. 601; Pearce v. Hall, 12 Bush (Ky.), 209, 212; Morris v. Murray, 82 Ky. 36, 44; Metropolitan Bank v. Godfrey, 23 Ill. 569, 603; Bullock v. Battenhousen, 108 Ill. 28, 36 (affirming s. c. 11 Ill. App. 665); Philbrooks v. McEuen, 29 Ind. 347; Brick v. Scott, 47 Ind. 299; Bowen v. Ratcliffe, 140 Ind. 393, 396; New v. Sailors, 114 Ind. 407; Ogborn v. Eliason, 77 Ind. 393; Ætna Life Ins. Co. v. Finch, 84 Ind. 301; First Nat. Bank v. Knowles, 67 Wis. 378.

[2] Hart v. Chalker, 14 Conn. 77. This was a bill in equity to foreclose the mortgage. A subsequent en-

So, in Illinois, the policy, though not the letter, of the recording acts requires a statement upon the records of the amount secured. On this subject it has been said: "The spirit of our recording system requires that the records of a mortgage should disclose with as much certainty as the nature of the case will admit of, the real state of the encumbrance. If a mortgage is given to secure an ascertained debt, the amount of the debt should be stated; and if it is given to secure a debt not ascertained, such *data* should be given respecting it as will put any one interested in the inquiry upon the track leading to a disclosure. If it is given to secure an existing or a future liability, the foundation of that liability should be set forth."[3]

In the later Illinois case cited in the last preceding note, Schofield, J., elaborates the same doctrine thus, after quoting from the recording act the words, "amount of indebtedness, the instrument was given to secure," and "amount claimed to be due." "A statement upon the record of the amount claimed to be due informs all what lien is claimed. They know what they must contest, or subject to what they must take in subsequently dealing with the property. It prevents secret conspiracies between the mortgagors and the mortgagees as to the fact and amount of indebtedness to the prejudice of subsequent purchasers and creditors, by compelling them to at once make known the real claim. In some instances, subsequent dealers with mortgaged property could not have information from the holders of indebtness secured by mortgage, because they could not be found,—as in the case of negotiable securities running for a long time, negotiated many times before maturity; and it might often be, as in the instance before us, perilous to rely on the word of the mortgagor. Undoubtedly, as between mortgagor and mortgagee, and as to persons having actual notice of the facts, both at common law and under our statute, a deed absolute on its face may be held to be a mortgage; but such cases are totally unaffected by our registry laws, and cannot, therefore, have the slightest analogy to the present case."[4] So, in Kentucky, a mortgage which does not state the note intended to be secured, or otherwise describe it sufficiently, is postponed to the rights of subsequently attaching creditors. The court of appeals of that State, speaking through Judge Lindsay, say: "The spirit of our statutes upon this subject requires not only that such conveyances shall be lodged for record, but that they shall show for themselves, and without the aid of extrinsic evidence to be obtained by inquiry, the nature of the lien, and, with a reasonable degree of certainty, the amount of the debts they are intended to secure. If the amount be ascertained, as in this case, it ought to be stated. If it be not ascertained, then such descriptive facts as are within the knowledge of the parties, and as tend to put one interested in the inquiry upon the track leading to a disclosure, ought to be set out. Unless this much is done, the public record does not show the state of the title, and room is left for the substitution of fictitious and fraudulent claims, and the prime object of the recording system is subject to be defeated. But the appellees claim that there is enough

cumbrancer, who had been made a party, appeared and demurred to the bill, and it was held that it was insufficient. *Ibid.*

[3] Metropolitan Bank v. Godfrey, 23 Ill. 569, 603, opinion of the court by Breese J. (new ed., 531, 552), quoted with approval in Bullock v. Battenhousen, 108 Ill. 28, 36. In both of these cases the Illinois court cite and rely upon North v. Belden, 13 Conn. 376, and Hart v. Chalker, 14 Conn. 77.

[4] Bullock v. Battenhousen, 108 Ill. 28, 37, affirming s. c. 11 Ill. App. 665. In this case, the mortgage described the note intended to be secured, by its date and the time it had to run, and the rate of interest, but omitted the amount of the note. The opinion in this case in the Illinois appellate court was written by a judge of exceptional learning and distinction, since deceased—a judge, who for many years, occupied the chair of professor in a leading law school of Chicago, and who was subsequently promoted to the Supreme Bench of Illinois, which office he held at the time of his death last year. It was pressed upon him by counsel in their argument that a distinguished author of a work on mortgages had stated the law, as resting in the weight of authority, to be contrary to the view taken by the court. He replied to this in the following language: "We are aware that Mr. Jones, in his valuable treatise on 'The Law of Mortgages,' after laying down the rule as above set forth, states that the cases which require this degree of strictness in describing the indebtedness, are not supported by the weight of authority. We have examined the cases cited by the learned author as the basis of this statement in his text, and are of the opinion that they do not warrant the conclusion at which he arrives." Bailey, C. J., in Battenhousen v. Bullock, 11 Ill. App. 665, 673. This case was affirmed by the Supreme Court of Illinois, 108 Ill. 28, and in giving the opinion of the court, Scholfield, J., said: "We concur in the main with the reason expressed by that court in its opinion, as reported in 11 Bradwell, 11 Ill. App. 665." 108 Ill. at p. 36.

in the mortgage to put purchasers and creditors upon inquiry, and that, in equity this amounts to notice. But it is not the notice contemplated in the statutes, and, as we have just seen, it cannot be so regarded by the courts without, in the main, subverting the obvious purpose for which they were intended.[5] In like manner, the Supreme Court of Indiana have said: "While literal accuracy in describing the debt secured, or the condition upon which the mortgage is to become void, is not required, it is essential that the character of the debt and the extent of the incumbrance should be defined with such reasonable certainty as to preclude the parties from substituting other debts than those described, thereby making the mortgage the mere cover for the perpetration of fraud upon creditors."[6] In a later case the same court have reiterated the same doctrine thus: "Literal accuracy in describing a debt secured by the mortgage is not required; but the description must be accurate so far as it goes, and full enough to direct attention to the sources of correct information in regard to it; and be such as not to mislead or deceive as to the nature or amount of it, by the language used."[7]

II. *What Mortgages have been Held Void Under this Doctrine.*—Under the operation of this doctrine mortgages have been held void, as against interested third persons, or valid only to the extent of the debt actually and ruthfully described, under the following facts: Where a mortgage given to secure $3,000 was, by a mistake of the clerk, recorded as $300.[8] Where a deed of trust securing bonds issued by a manufacturing corporation falsely recited that the bonds were issued to raise working capital, whereas they were issued to pay existing debts.[9] Where the mortgage described as an absolute indebtedness a note which was really given as a security for a contingent liability assumed by the mortgagee for the mortgagor.[10] Where the condition of the mortgage was to pay a note accurately described, and "all other notes the said grantee might indorse for or give for said Griswold (the mortgagor) at the bank or elsewhere, and all residues said Pettibone, deceased, might hold against said Griswold."[11] Where the condition of the mortgage was to secure the payment of a demand note for $500, in pursuance of an agreement between them whereby the mortgagee was to assume such responsibility, from time to time as requested by the mortgagor,—the court holding the mortgage void as to other creditors because the nature of the transaction did not appear upon the record with reasonable certainty.[12] Where the note described in the mortgage as intended to be secured, was a note for $1,000, and no such note had been given, but the mortgagor was indebted to the mortgagee for goods sold to the amount of $467.26, and the mortgagee had agreed to furnish the mortgagor with additional goods, making the total amount of the indebtedness $1,000, and it was agreed that the mortgage should stand as security for the whole,—the court holding it void as against subsequent attaching creditors.[13] Where the mortgage was given to secure two notes described therein by their dates and amounts, and the evidence showed that the mortgagee had never held such notes of the mortgagor, but that he held three notes of the mortgagor of different amounts, none of them bearing the dates of the notes described in the mortgage,—the court holding the mortgage void as against other creditors of the mortgagor.[14] Where a recorded mortgage set forth that B was indebted to D in a sum named, to be credited with such amounts as D might be owing to B for brick, etc., the court holding that this description of the debt was too vague to prevail against a subsequent mortgagee.[15]

[5] Pearce v. Hall, 12 Bush (Ky.), 209, 212. The court, further on, intimated that a failure to state in the mortgage the precise amount of the debt might not, under all circumstances, vitiate it, and that the mortgage in the case before the court might possibly be reformed in equity. *Ibid.* 213, 214.

[6] New v. Sailors, 114 Ind. 407, 410; citing Pettibone v. Griswold, 4 Conn. 158.

[7] Bowen v. Ratcliffe, 140 Ind. 393, 397; citing New v. Sailors, 114 Ind. 407; Ogborn v. Eliason, 77 Ind. 393; Ætna Life Ins. Co. v. Finch, 84 Ind. 301.

[8] Frost v. Beekman, 1 Johns. Ch. 288.

[9] First Nat. Bank v. Knowles 67 Wis. 373.

[10] Stearns v. Porter, 46 Conn. 313.

[11] Pettibone v. Griswold, 4 Conn. 158.

[12] North v. Belden, 13 Conn. 376. For a somewhat similar case in the same State decided the same way, see Sanford v. Wheeler, 13 Conn. 165.

[13] Bramhall v. Flood, 41 Conn. 68.

[14] Jewett v. Preston, 27 Me. 400.

[15] Morris v. Murray, 82 Ky. 36, 44. In Follett v. Heath, 15 Wis. 601, a case arising between the original parties to the transaction, it was held that a mortgage given to secure a note of a particular date and amount, could not be foreclosed upon proof that the mortgagor was indebted to the mortgagee upon a note

III. *Doctrine that Imperfections in Description of the Debt in a Mortgage will not Avoid it as to Interested Third Persons, Provided the Description is Sufficient to put them upon Inquiry.*—There is another mass of adjudged cases which hold that a mortgage of land or of chattels is not to be avoided at the suit of interested third persons, creditors or purchasers, by reason of the mere fact that the debt intended to be secured thereby is not described therein with such certainty as the case admits of.[16] Some of these cases go so far as to hold that a mortgage is not avoided as to interested third persons from the fact that the amount of the debt intended to be secured is not stated at all.[17] It is necessarily a part of this doctrine that the real amount and nature of the debt which the mortgage was intended to secure may be proved by parol.[18] But all the cases so holding proceed upon the ground, either stated in express terms or necessarily implied, that a mortgage will be valid where it describes the debt in such a manner that an interested third person is directed, by what appears upon the public records, to the real sources of information, where the true state and amount of the debt can be ascertained; and in none of them has a mortgage been upheld which had been purposely so drawn to defeat such an inquiry. The general principle which runs through this whole mass of cases may be stated to be that the description of the debt need not be so exact as to exclude all extraneous inquiry, but that it will be sufficient if stated with such exactness that a third person, by the exercise of prudence and ordinary diligence, could ascertain the real extent of the incumbrance.[19] That such is the doctrine of the Supreme Court of the United States is shown by the language of Mr. Justice Swayne, in giving the opinion of the court in Jones v. Guaranty, etc. Co.,[20] where he said, referring to some of the decisions already cited: "The grounds upon which they proceed are, that a thing is to be regarded as certain that can be made certain; that where there is enough to put those concerned upon inquiry, the means of knowledge and knowledge itself are, in legal effect, the same thing."

IV. *Doctrine that the Language Employed in Describing the Debt must not have been Devised to Mislead or Conceal.*—The rule under consideration, as stated by Leonard A. Jones, in his authoritative work on Mortgages, is as follows: "It is sufficient if the description be accurate as far as it goes, and full enough to direct attention to the sources of full and correct information in regard to it, and the language used is not liable to deceive or mislead as to the nature and amount of it."[21] This doctrine is found embodied,

bearing a different date and for a different amount, and payable at a different time, without having the mortgage reformed in equity; and hence that the mortgagee could not justify a seizure of the mortgage chattel under the instrument, without first reforming it. But see Paine v. Benton, 32 Wis. 491, where this case is limited.

[16] Among such cases are the following: Shirras v. Caig, 7 Cranch (U. S.), 31, 51, opinion by Marshall, C. J. (the leading case and the foundation of the doctrine); Jones v. Guaranty, etc. Co., 101 U. S. 622; Wood v. Weimar, 104 U. S. 786, 793; Peters v. Goodrich, 3 Conn. 146; Stoughton v. Pasco, 5 Conn. 442; Bolles v. Chauncey, 8 Conn. 387; Booth v. Barnum, 9 Conn. 296; Crane v. Deming, 7 Conn. 386; Paine v. Benton, 32 Wis. 491; Ætna Life Ins. Co. v. Finch, 84 Ind. 301, 304; Ogborn v. Eliason, 77 Ind. 393; Clark v. Hyman, 55 Iowa, 14; Pike v. Collins, 33 Me. 38, 45; Babcock v. Lisk, 57 Ill. 327 (overruled in effect in Bullock v. Battenhousen, 108 Ill. 28); Kellogg v. Frasier, 40 Iowa, 502; Hurd v. Robinson, 11 Ohio St. 232, 237; Gill v. Pinney, 12 Ohio St. 38; Gillman v. Moody, 43 N. H. 239, 244; Ricketson v. Richardson, 19 Cal. 330; Sheafe v. Gerry, 18 N. H. 245; Lee v. Fletcher, 46 Minn. 49, 48 N. W. Rep. 456, 12 L. R. A. 171; Nazoo v. Ware, 38 Minn. 442, 38 N. W. Rep. 367; Gordan v. Preston, 10 Watts (Pa.), 385.

[17] Young v. Wilson, 27 N. Y. 351, reversing s. c. 24 Barb. (N. Y.) 510; Burnett v. Wright, 135 N. Y. 542, 32 N. E. Rep. 253 (between original parties); McDaniels v. Colvin, 16 Vt. 300; Seymour v. Darrow, 31 Vt. 122, 133; Michigan Ins. Co. v. Brown, 11 Mich. 265; Machette v. Wonless, 1 Colo. 225, 228; Hurd v. Robinson, 11 Ohio St. 232; Norris v. Lake, 89 Va. 513, 517, 16 S. E. Rep. 663; Keagy v. Trout, 85 Va. 390, 399; Fates v. O'Laughlin, 62 Iowa, 532, 17 N. W. Rep. 64.

[18] Paine v. Benton, 32 Wis. 491, 497; Lee v. Fletcher, 46 Minn. 49, 48 N. W. Rep. 456, 12 L. R. A. 171; Nazoo v. Ware, 38 Minn. 442, 447, 38 N. W. Rep. 357; Williams v. Hilton, 35 Me. 547; Hurd v. Robinson, 11 Ohio St. 232; Wood v. Weimar, 104 U. S. 786, 793, and other cases above cited

[19] Peters v. Goodrich, 3 Conn. 146; Stoughton v. Pasco, 5 Conn. 442; Bolles v. Chauncey, 8 Conn. 387; Booth v. Barnum, 9 Conn. 296, 23 Am. Dec. 339; Crane v. Deming, 7 Conn. 386; Paine v. Benton, 32 Wis. 491; Pike v. Collins, 33 Me. 38, 45; Babcock v. Lisk, 57 Ill. 327; Kellogg v. Frasier, 40 Iowa, 502; Morris v. Murray, 82 Ky. 36, 44 (doctrine recognized); Hurd v. Robinson, 11 Ohio St. 232, 237; Jones v. Guaranty etc. Co., 101 U. S. 622; Ætna Life Ins. Co. v. Finch, 84 Ind. 301, 305; Ogborn v. Eliason, 77 Ind. 393, 395; Seymour v. Darrow, 31 Vt. 122, 133; McDaniels v. Colvin, 16 Vt. 300; 1 Jones Mortg., § 70.

[20] 101 U. S. 622, 633.

[21] 1 Jones Mortg., § 70. This statement of the learned author has been frequently quoted by the judges with approval. See for instance, Morris v. Murray, 82 Ky. 36, 44; Ætna Life Ins. Co. v. Finch, 84 Ind. 393, 395.

by way of a qualification or concession, in many of the cases previous. For a single example, we may cite the statement of Gholson, J., in the leading case in Ohio, which has been the foundation of much of the American law in favor of relaxing strictness in the description of the debt in mortgages. In giving the opinion of the court, which is a very able one from his point of view, he says: "He (the mortgagee) cannot, as to the persons who act on the faith of that notice, assert what would be in contradiction of its terms; he cannot be permitted to mislead or deceive."[22]

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[22] Hurd v. Robinson, 11 Ohio St. 232, 237. For a striking case where this principle was applied, and where a deed of trust to secure bonds issued by a manufacturing corporation was held void as to creditors, because it falsely recited that the bonds were issued to raise working capital, whereas they were issued to pay existing debts, see First National Bank v. Knowles, 67 Wis. 373.

LANDLORD AND TENANT—TENANT'S DUTY TO REBUILD—COVENANTS.

ARMSTRONG v. MAYBEE.

Supreme Court of Washington, April 19, 1897.

1. A tenant need not rebuild, in case of destruction of the premises without his negligence, unless he has expressly covenanted to do so.

2. A tenant expressly agrees to rebuild, in case of accidental destruction, by a covenant to maintain the premises during the term in as good condition and repair as when leased, and return them to the landlord at the expiration of the term in such condition, "reasonable wear and tear from ordinary use alone excepted."

REAVIS, J.: Respondent brought action for breach of covenant in a lease of a shingle mill and machinery. Respondent leased to appellants a shingle mill, mill grounds, mill machinery, dry house, office, and office fixtures for a term beginning the 13th of October, 1894, and ending the 1st day of January, 1896, unless the lease should be terminated by a sale of the property by the lessor. After stipulations for the payment of rent, the following covenants were stated: "The lessee shall maintain all of the machinery and buildings of said mill in as good condition and repair as the same now are in, and return the same to the lessor at the expiration of said lease in as good condition as the same are now in, reasonable wear and tear excepted. * * * That he [lessee] will maintain all the said mill, machinery, and buildings in as good condition and repair as the same are now in, and return the same to lessor at the expiration or termination of this lease in as good condition as the same are now in, reasonable wear and tear from ordinary use alone excepted." There was a further stipulation that the lessee should, during the continuance of the term, maintain and keep employed and on duty at and about the mill a day watchman and a night watchman, whether the mill was operated or not. In March, 1895, the mill was entirely destroyed by fire. Respondent alleged in his complaint that this fire was because of appellants' negligence. This was denied in the answer, but no question is raised here upon this point. The court instructed the jury as follows: "The court instructs you that the lease introduced in evidence and set out in the plaintiff's complaint between these parties imposes an obligation upon the defendant to rebuild the buildings and the mill in case it should be burned during the tenancy. In other words, he was under the obligation to return that mill to him in as good condition as it was at the time he received it, reasonable wear and tear excepted." Appellants contend that the instruction was wrong, and counsel have with much industry and learning cited many authorities in support of appellants' claim that the language written in the lease does not constitute a covenant to rebuild in case of fire by accident, and without fault of the lessee. Without reviewing in full the cases presented in the respective briefs of counsel here, but stating our conclusion from an examination of them, we are of opinion that, without an express covenant to rebuild, the lessee is under no obligation to do so. We understand this to have been the settled law since the time of Edward IV., first in England and followed in this country. But either lessor or lessee may make any agreement which is lawful relative to repairs during the term, or to rebuild in the event of the destruction of the buildings; and, when such covenant is made, it must be enforced. In the lease under consideration the terms used constitute an express covenant to repair. Tayl. Landl. & Ten. (8th Ed.) § 364, states the rule which is approved by the great weight of authority: "Under an express covenant to repair the lessee's liability is not confined to cases of ordinary and gradual decay, but extends to injuries done to the property by fire, although accidental; and, even if the premises are entirely consumed, he is still bound to repair within a reasonable time. And the principle applies to all damages occasioned by a public enemy, or by a mob, flood, or tempest. Thus, where the covenant is to repair in general terms, or to repair, uphold, and support, or however otherwise phrased, if it undertakes the duty of repair, it binds the lessee to rebuild if the premises are destroyed. For this reason, and in order to afford some protection to the tenant, it is customary to introduce into the covenant to repair an exception against accidents by fire, tempest, or lightning." Wood, Landl. & Ten. (2d Ed.) § 370, declares: "If a lessee covenants to repair and keep the premises in repair during the

term, not excepting damage by fire or the elements, he is bound to rebuild them if burnt down by accident, negligence, or otherwise. It is of no importance how the covenant is worded. Unless it is qualified, the lessee is bound to rebuild in case the buildings are destroyed by fire or other casualty during the term. The tenant, if the burden of the covenant rests upon him, or the landlord, if he is the covenantor, must rebuild. Thus a covenant 'to repair, uphold, and support,' or to 'well and sufficiently repair,' or to keep in repair and leave as found, or to 'repair and keep in repair,' to keep in 'good repair, natural wear and tear excepted,' to make 'all necessary repairs,' to deliver up 'in tenantable repair,' or to 'deliver up the premises in as good a condition as they now are,' all impose upon the covenantor the duty of rebuilding or restoring premises destroyed or injured by the elements." The case of Warner v. Hitchins, 5 Barb. 666, cited by appellants, was upon the following clause in a lease: "And also at the expiration of the lease to surrender up the possession of the said premises in the same condition the same now are, natural wear and tear excepted." The lease contained no other express stipulations on the part of the defendants. The court in that case held that this clause did not constitute an express stipulation to repair. And thus, in the case of McIntosh v. Lown, 49 Barb. 550, cited by appellants, the court said: "The defendants' covenant in the lease 'to keep the buildings and fences in good repair, except natural wear and tear,' bound them to rebuild in case of accidental destruction by fire or otherwise." And the lessee was there held liable in damages for the value of a barn destroyed, which he did not rebuild. In this case the court restates the views held in 5 Barb., *supra*, as follows: "Some authorities hold that where the covenant by the lessee is to repair and leave the premises in the same state as he found or received them, or language to that effect, he is merely required to use his best endeavors to keep them in the same tenantable repair, and is not bound, by such a covenant, to restore buildings destroyed by fire or otherwise, during the term, without his fault. This is in consequence of a construction given to the covenant that the lessee is so to repair or keep in repair the buildings, etc., as to leave the demised premises in the same state as he received them; and such, I think, is the settled law. But where the covenant is to repair, or keep in repair generally, the buildings, etc., without the qualifying words mentioned, all the authorities hold that it requires the tenant to rebuild, etc., in case of the accidental destruction of the buildings," etc. The case of Van Wormer v. Crane, 51 Mich. 363, 16 N. W. Rep. 686, was upon a lease containing the exception of "damages by the elements" in the covenant to repair, and it was held by Judge Cooley that destruction of a building by accidental fire was included within the exception. We agree with the rule of construction stated by Judge Sherwood in the concurring opinion in that case that: "In construing the covenants contained in a lease, the cardinal rule is that the intention of the parties shall govern; and the courts will not extend or enlarge the obligation of the lessee beyond the plain meaning of the language used and the intention existing at the time it was made; and, if there is not an express stipulation to the effect to restore buildings and other property leased, destroyed by casualties from fire or water, without fault or neglect on the part of the tenant, the loss must fall upon the landlord or reversioner." But in the case at bar we are unable, from any fair reading of the whole lease, to find any doubtful language, or anything in the circumstances of the parties, which would require other than one construction of the language used. They chose to use language and terms which have had a received meaning in the courts for generations, and, though the phraseology may slightly differ from that of contracts under consideration in some of the adjudicated cases, we cannot see any distinction in the meaning. We are not able to find any qualification of the general covenant to repair in this lease. The contract is one before the court for construction and enforcement as the lessor and lessee have made it. Our conclusion is that it imposed on the lessee the obligation to rebuild the mill which was destroyed by fire. The judgment of the superior court is affirmed.

NOTE.—The general propositions of law governing the duty of a tenant to make repairs may be stated as follows: In the absence of any covenant on the subject, the law obliges the lessee to so use the premises that no substantial injury shall be occasioned to them. 6 Lawson's Rights, Remedies & Pr. p. 4636; United States v. Bostwick, 94 U. S. 53. But this implied obligation is not to repair generally, but to so use the property as to make repairs unnecessary as far as possible. It is, in effect, only a covenant against voluntary waste. The lessee is not obliged to make good the ordinary ravages of time or of the elements, unless he has expressly agreed to do so. Johnson v. Dixon, 1 Daly, 178; Bald v. O'Brien, 12 Daly, 160; Fash v. Kavanaugh, 24 How. Pr. 347. It has been held that it is the duty of a tenant who has leased a farm on shares to keep the fences in repair in the absence of a contrary covenant. Fenton v. Montgomery, 19 Mo. App. 156. As a general rule if a tenant puts repairs on the premises without the consent of the landlord he cannot charge the landlord for them. Kline v. Jacobs, 68 Pa. St. 57. Where the lessee covenants to keep the premises in repair he must keep them wind and water tight, and put on fair and tenantable repairs. An express and unconditional covenant to repair, and keep in repair, binds him to rebuild in case of destruction by fire or other accident. Ross v. Overton, 3 Call. 309; Scott v. Scott, 18 Gratt. 166; Abby v. Billups, 35 Miss. 618; Hoy v. Holt, 91 Pa. St. 88; Van Worner v. Crane, 51 Mich. 363. An exception in a covenant to repair damages by the elements or the act of God will not include damages to which human agency in any way contributed. Polock v. Pioche, 35 Cal. 416. Good repair is a relative term and varies with the age of the building, the purpose for which it is leased and occupied, and other similar circumstances. Flint v. Pierce, 11 R. I. 576;

Scott v. Haverstraw Clay Brick Co. (N. Y.), 31 N. E. Rep. 1102. Such a covenant does not bind the tenant either to put or leave the premises in better repair than they were at the date of the covenant. West v. Hart, 7 J. J. Marsh. 258. A lessee of a wooden building covenanting to rebuild in case of fire is released by the enactment of a valid ordinance prohibiting the erection of a wooden building. Cordes v. Miller, 39 Mich. 581.

Where boilers in a saw-mill were in good repair at the time the lease was made, and the lessee covenanted to keep them in repair, the lessor is not liable for the injuries caused by their becoming rusted and unfit for use. Deller v. Hofferberth (Ind.), 26 N. E. Rep. 889. A tenant rented a house in bad repair, and covenanted to "bear all the expenses of repairing or improving the premises during his occupancy." During the term repairs became necessary, and the landlord made them after the tenant had refused, when requested, either to repair or surrender possession. Held, that the tenant was liable to the landlord for the cost of the repairs. Martinez v. Thompson (Tex.), 16 S. W. Rep. 334. A lease providing that the lessee shall, to a specified amount, "put cash in repairs" on the leased premises, confers no right to charge the tenant with repairs made by the landlord. Schrage v. Miller (Neb.), 62 N. W. Rep. 1091. Under a covenant to "make all necessary repairs," a tenant is liable for the breaking of a plate glass of the building, though it was broken without his fault. Cohn v. Hill (City Ct. Alb.), 30 N. Y. S. 209.

JETSAM AND FLOTSAM.

THE RIGHT TO FREEDOM OF CONTRACT.

The plaintiff in a recent case in an Ohio Circuit Court (Shaver v. Pennsylvania Co., 71 Fed. Rep. 931), became a member of a relief association managed by the defendant railway, under an agreement that the acceptance of benefits from it for any disability should bar a suit for damages against the defendant. An Ohio statute made void such a term in the contract of a railway employee. The plaintiff having accepted aid from the association before suing the railway, the court held the statute unconstitutional, and the contract a valid defense.

The Ohio constitution guarantees the rights of life, liberty, and property, and provides that laws of a general nature shall be uniform in their operation. The court thought the statute obnoxious to both of these provisions, inasmuch as it deprived the plaintiff of liberty to make contracts for his labor, and, being confined to railway employees, was not uniform in its operation.

There are a considerable number of decisions in this country denying the constitutionality of similar legislation. See Millett v. People, 117 Ill. 294 (1886); Frorer v. People, 141 Ill. 171 (1892); Ramsey v. People, 142 Ill. 380 (1892); Braceville Coal Co. v. People, 147 Ill. 66 (1863); Comm. v. Perry, 155 Mass. 117 (1891); Godcharles v. Wizeman, 113 Pa. St. 431 (1886); State v. Loomis, 115 Mo. 307 (1893); State v. Goodwill, 33 W. Va. 179 (1889). In all of these cases it is assumed that the constitutional guaranty of "liberty" includes "freedom of contract."

It is difficult to defend this assumption, historically or practically. The terms "life," "liberty," and "property," as used in the bills of rights of American constitutions, have all been derived from Magna Charta, and have been used in various English and American statutes, State papers, and political writings, in a similar sense, down to the framing of our American constitutions. The meaning of "liberty" as thus used was personal liberty,—freedom from bodily restraint. See 1 Black. Com. 127-129; 2 Kent Com. 26*ff*; and especially an article by C. E. Shattuck, 4 Harvard Law Review, 365. These terms, in a clause whose significance had been well understood by English speaking publicists and lawyers for several centuries, were imported bodily into most of our American constitutions without indication of an intention to enlarge their scope. Historically, therefore, one can hardly justify a judicial extension of the meaning of "liberty" so radical as to embrace freedom of contract.

But, putting aside all lexicographer's arguments, is such an extension of meaning desirable or in accord with unquestioned legislative precedents? In most of the States there are laws avoiding contracts to pay more than a maximum rate of interest for the use of money; in many there are laws invalidating certain conditions in insurance policies deemed technical or oppressive; and in some there are acts forbidding parties by private contract to shorten the statutory period for bringing actions between them. The constitutionality of such legislation has never been doubted, nor is it difficult to discover a sound principle of public policy on which, within the discretion of the legislature, such laws may rest. Whenever two classes of persons may reasonably be supposed to stand in such relation to each other that the necessity or weakness of one deprives it of real liberty of action in regard to contracts between the two, it is a proper exercise of legislative power to interfere in behalf of the class in danger of being overreached. Opinions may differ about the need of such protection in a given case, but if the legislature can reasonably decide that it exists, it is not for the judiciary to revise this determination. Surely it is not unreasonable to suppose that men practically compelled to seek their accustomed employment from a few large railway corporations may be at such a disadvantage in bargaining for the sale of their labor that it will be wise to forbid them altogether from making certain contracts. If interdictions against particular agreements concerning loans, insurance, and liability to suit are constitutional, it is not easy to distinguish from them the prohibition of the Ohio statute.

The objection that this is class legislation seems even less forcible. "The lawmaker necessarily deals with conditions as he finds them. If he observes, and wishes to abate, some fraudulent practice or abuse of power prevailing only in some one line of business, the fact that, in legislating to correct it, he does not also include in his remedy all other phases of human affairs, can furnish no reason for stigmatizing his remedy as no law at all." Barclay, J. (dissenting), in State v. Loomis, 115 Mo. at p. 322. In every State, mechanic's liens, and particular regulations relating only to carriers, bankers, auctioneers, pawnbrokers, insurance companies, or warehousemen, bear witness to the necessity and wisdom of laws of special application to limited classes of persons. The principle of this legislation is well stated by Justice Field in Barbier v. Connolly, 113 U. S., at pp. 31, 32 (1884): "Regulations for these purposes, . . . though in many respects necessarily special in their character, . . . do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions."

Statutes of a character similar to the one in Shaver v. Pennsylvania Co., have been sustained in Hancock

v. Taden, 121 Ind. 366 (1890); State v. Manufacturing Co., 18 R. I. 16 (1892); and State v. Coal Co., 36 W. Va. 802 (1892); and this is believed to be the sounder and more satisfactory doctrine.—*Harvard Law Review.*

EVASION OF USURY LAWS.

Western enterprise has recently evolved a most ingenious method of evading the usury laws. The only difficulty about it is that it will not work. The meddlesome and stupid courts decline to allow the inventor to reap the reward of his ingenuity. The underlying principle upon which the scheme rests is the familiar one that, where the lender puts the principal sum loaned in jeopardy, the loan is not usurious, though the rate of interest exceed the limit allowed by law—the most common illustrations of which are afforded by contracts of bottomry and *respondentia*. 3 Minor's Inst. 313. The plan of our western money-shark contemplates that the borrower shall bind himself to repay the loan in monthly installments, at an exorbitant rate of interest, but with the concession on the part of the lender that if the borrower die before the last installment of principal and interest is due, then the loan shall be considered paid and the entire obligation be cancelled. Thus, the principal being put in jeopardy and the usurious interest being dependent upon a contingency, to-wit, the continuance of the life of the borrower, the transaction seems to be well protected against the usury laws. But your western creditor, while willing, for sake of evading penalties against usury, to go through the form of hazarding his principal, does not propose to risk it in fact. He accordingly exacts one slight concession from the borrower—so slight that no well-disposed borrower could reasonably object to it—which is that the lender shall have the privilege, at his own expense, of taking out an insurance policy on the life of the debtor, for the amount of the loan. The policy is accordingly taken out, payable to the lender, who pays the premiums—but he has taken care to include in his interest-charge more than the cost of insurance, over and above the legal rate. So that, after all, the principal has not been for a moment in jeopardy.

In condemning such a transaction as a shift to evade the penalties of usury, the Supreme Court of Minnesota, through Mitchell, J., in the case of Missouri, etc. Trust Co. v. McLachlan, 61 N. W. Rep. 560, says:

"We had supposed that in the course of our professional and judicial experience, we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and, after a careful study of all its provisions, it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this State; but we shall take the plaintiff at his word and assume, without deciding, that it is not a life insurance contract, and hence that the laws of this State prohibiting and declaring invalid such contracts made by a foreign insurance company, which has not complied with our statutes, are inapplicable. It remains to consider whether the facts justify the conclusion that the scheme was devised as a cover for usury."

And it was held that the scheme was a colorable device to conceal usury, and that the mortgage executed by the borrower to secure repayment of the loan was void; the court saying: "The mere fact that the contract has the form of a contingency will not exempt it from the scrutiny of the court, which is bound to exercise its judgment in determining whether the contingency be a real one, or a mere shift and device to cover usury."

The same device met a similar fate at the hands of Caldwell, J., in Missouri, etc. Trust Co. v. Krumseig (U. S. C. C. App.), 77 Fed. Rep. 32.—*Virginia Law Register.*

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 53.

This latest volume of a sterling series of reports contains an admirable selection of recent cases from the courts of last resort of the several States. Appended to many of them are valuable annotations by the editor, A. C. Freeman, Esq. A few of such cases are: De La Montanya v. De Montanya (Cal.), wherein is exhaustively discussed the jurisdiction of courts over absent citizens; People v. Kirk (Ill.), in which is considered the title to land covered by tidal and other navigable waters; Payton v. McQuown (Ky.), as to negligence as a bar in equity to relief against judgments; Browm v. Westerfield (Neb.), on what is a delivery of a deed. The series is published by Baneroft Whitney Co., San Francisco.

BOOKS RECEIVED.

General Digest, American and English. Refers to all Reports Official and Unofficial. Vol. II, New Series. Rochester, N. Y. The Lawyers' Co operative Publishing Company, 1897.

Famous Legal Arguments Showing the Art, Skill, Tact, Genius and Eloquence Displayed by our Greatest Advocates in the More Celebrated Trials of Modern Times, with Several Famous Cases on Circumstantial Evidence. By Moses Field. Rochester, N. Y. E. J. Bosworth & Co., Publishers, 1897.

Probate Reports Annotated: Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With Notes and References. By Frank S. Rice, Counsellor at Law, Author of "American Probate Law," and "Civil and Criminal Evidence." Vol. I. New York: Baker-Voorhis & Company, 1897

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Evidence of Injury.—Where an accident policy provides for indemnity for injuries which shall, independently of other causes, wholly disable the insured "from prosecuting any and every kind of business pertaining to his occupation," an insured can recover on direct proof of the injury and evidence that he was in the real estate business, and that he went to his office every day for a short time, but was unable to do any kind of work.—TURNER V. FIDELITY & CASUALTY CO. OF NEW YORK, Mich., 70 N. W. Rep. 898.

2. ADMINISTRATION—Accounting—Surviving Partner.—An administrator who is surviving partner of deceased, and who is given leave by the probate court to retain the partnership stock, and account therefor, at the inventoried value, in his account of the partnership, is chargeable with interest from the time of receiving such stock, where he sells it in his individual business, not using the price for the benefit of the partnership.—GEE V. HUMPHRIES, S. Car., 27 S. E. Rep. 101.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS — Fraud.—A trust deed for the benefit of creditors is not fraudulent on its face, merely because it authorizes the trustee to carry on the grantor's business, and does not in terms direct him to sell when required by the creditors secured by the deed, since the trustee is required by Code, § 2442, to sell at the instance of such creditors.—TAYLOR V. MAHONEY, Va., 27 S. E. Rep. 107.

4. ASSIGNMENTS FOR CREDITORS — Fraud.—The fact that a debtor, in making an assignment for the benefit of creditors, did not surrender all his property, does not render the deed invalid as to such property as was embraced in it and surrendered.—ROSENBERG V. SMITH, Ky., 40 S. W. Rep. 243.

5. ATTACHMENT — Dissolution.—Under section 235, Code Civ. Proc., defendant may, at any time before judgment, upon reasonable notice to plaintiffs, move to dissolve an attachment; and the fact that the attached property does not belong to the defendant, or is incumbered for its full value, does not bar or estop him from filing a motion to discharge.—MCCORD-BRADY CO. V. BOWEN, Neb., 70 N. W. Rep. 950.

6. BANKS—Check—Presentation.—Where there is no excuse for delay, the payee of a check drawn on a bank in another place must forward it by mail to the bank's domicile on the day after he receives it, and his local agent must present it the day after it reaches him by due course of mail.—GREGG V. BEANE, Vt., 37 Atl. Rep. 248.

7. BILL—Married Woman—Separate Estate.—Real estate conveyed by deed to a married woman direct, with words of transfer in the premises, "grant, bargain, sell, and convey and confirm unto the said party of the second part (the married woman), and to her heirs and assigns forever, all of the following piece," and a *habendum* and *tenendum* clause, "to have and to hold the above mentioned and described premises, with the appurtenances, and every part thereof, to the said party of the second part and to her heirs and assigns forever," is the separate statutory property of such married woman.—HILL V. MEINHARD, Fla., 21 South. Rep. 805.

8. BILLS AND NOTES—Note of Husband and Wife.—One who takes a promissory note payable to himself, signed by a man and his wife, apparently as joint principals, is in law chargeable with notice of such facts concerning the real consideration of the paper and of the wife's true relation thereto as are known to another, who, in behalf of the payee, and at his instance and request, conducts the negotiation leading to the execution and delivery of the note to the latter; and if, in fact, the wife signed the note as surety for the husband, it was, so far as the rights of such payee were concerned, void as to her, and she could maintain against him an action for the recovery of money or property belonging to her separate estate with which she had parted in a settlement with him of the note.—STRICKLAND V. VANCE, Ga., 27 S. E. Rep. 152.

9. BILLS AND NOTES — Note Payable to Maker—Release.—A note "payable on demand after date," executed to cover the amount due upon prior unpaid notes by the same maker, is merely a demand note, and does not extend the time of payment for one day, so as to release an indorser on such other notes.—PENINSULAR SAV. BANK V. HOSIE, Mich., 70 N. W. Rep. 890.

10. BILLS AND NOTES—Pleading — Guaranty.—All allegation in a plea by one of the joint makers of a note, in an action thereon, that he signed without any consideration, will be construed as an averment only that he received none of the money loaned on the note, where the plea further alleges that the loan was to the other signers, that defendant signed as a guarantor, and that the loan was made with that understanding.—STEVENS V. GIBSON, Vt., 37 Atl. Rep. 244.

11. BONDS—Judgment Creditor.—The holder of coupons cut from county bonds issued in satisfaction of a judgment is the owner of a part of the same debt evidenced by the judgment itself, and is in privity with the judgment creditor. In an action upon the coupons he may invoke every presumption and estoppel in support of his claim which the judgment creditor could call to his aid in an action upon the judgment.—BOARD OF COMRS. OF LAKE COUNTY V. PLATT, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 567.

12. BUILDING AND LOAN ASSOCIATIONS—Insolvency—Mortgage.—Where the trustee under the power therein contained forecloses a mortgage executed by a borrowing member of a building association, and the association is then in the hands of receivers as insolvent, it is his duty to pay all the proceeds of the sale to the receivers, though in excess of the amount due on the mortgage, since the mortgagor is a member as well as a debtor, and his liability cannot be known until it is ascertained to what amount the association is insolvent.—THOMPSON V. NORTH CAROLINA BUILDING & LOAN ASSN., N. Car., 27 S. E. Rep. 118.

13. CARRIERS—Passenger — Damages.—Parties rightfully on a railroad train, by virtue of a contract for their carriage to an agreed destination, and who are wrongfully ejected before the journey is completed, may sue for a breach of the contract, or in an action *ex delicto* for tort or negligence of the carrier.—CHICAGO, ETC. CO. V. SPIRK, Neb., 70 N. W. Rep. 926.

14. CARRIERS—Passenger—Evidence—Declarations.—In an action for injuries caused by the derailing of a street car because of excessive speed in going down a hill, statements made by the motorman to plaintiff prior to the accident as to the condition of the track, the want of sand, the overloaded condition of the car, and the excessive speed, were admissible as part of the *res gestæ*.—WITSELL V. WEST ASHEVILLE, ETC. RY. CO., N. Car., 27 S. E. Rep. 125.

15. CARRIERS—Passengers — Presumption.—A person who boarded a passenger train, able and intending in good faith to pay his fare, was a passenger, though in

his hurry, the train being already in motion, he got on the front platform of an express car, which the conductor could not reach without stopping the train.—MISSOURI, ETC. RY. CO. OF TEXAS V. WILLIAMS, Tex., 40 S. W. Rep. 350.

16. CARRIERS OF GOODS — Connecting Carriers.—A carrier accepting goods directed to a point off its line is only liable to the extent of its own route, and for a safe delivery to the next carrier, in the absence of an express and special contract extending liability to losses on lines of connecting carriers.—HOFFMAN V. CUMBERLAND VAL. R. CO., Md., 37 Atl. Rep. 214.

17. CHATTEL MORTGAGES — Execution.—Under Code 1886, § 1731, requiring a chattel mortgage to be in writing, and "subscribed" by the mortgagor; and section 1, providing that "subscription" includes a mark when a person cannot write his name, his name being written near it, "and witnessed by a person who writes his own name as a witness,"—a mortgage is invalid when the mortgagor subscribes by a mark, and this is attested only by a witness who also subscribes by a mark.—HOUSTON V. STATE, Ala., 21 South. Rep. 818.

18. CHATTEL MORTGAGES — Filing — Notice.—Before the filing of a chattel mortgage, the property was removed to another county, where it was sold for value. Afterwards the mortgage was filed in the county where it was given, and where the property had been situated; and subsequently, by agreement with said purchaser, a prior mortgagee seized and sold the property in a mode other than that prescribed by statute for sales in foreclosure of chattel mortgages. The subsequent mortgagee sued the purchaser and the prior mortgagee for conversion: Held, that the mortgage not having been filed in the county where the property was situated at the time of filing, as required by Comp. Laws, §§ 4379, 4380, the burden was on plaintiff mortgagee to show that the purchaser took with actual notice of the mortgage.—LA CROSSE BOOT & SHOE MANUFG. CO. V. MONS ANDERSON CO., S. Dak., 70 N. W. Rep. 877.

19. CONDITIONAL SALE—Repairs.—A lien on a chattel for repairs is lost by redelivery to the owner after the repairs are made.—BLOCK V. DOWD, N. Car., 27 S. E. Rep. 129.

20. CONTEMPT — Judgment in Vacation.—A proceeding in vacation, adjoining one guilty of contempt for disobeying a judgment or order of the court, is void.—EX PARTE ELLIS, Tex., 40 S. W. Rep. 275.

21. CONTRACTS—Custom.—In the absence of an established local custom to attach a peculiar meaning to the words "good and workmanlike manner," where a tile layer, after notice that "nice work" is expected, and an inspection of the pattern which he is expected to follow, professes himself competent to do the work, and expressly agrees to lay the tiles in a "good and workmanlike manner," he must lay them in a manner considered skillful by those capable of judging such work in any place.—FITZGERALD V. LA PORTE, Ark., 40 S. W. Rep. 267.

22. CONTRACT — Rescission—Return of Benefits.—If the general rule that one who, on the ground of fraud or of mental incompetency to contract, seeks to rescind an executed agreement of which he has received the fruits, must, before bringing his action, make or offer to make restoration to the opposite party, admits of any exception because of the plaintiff's inability from poverty to meet this requirement, such exception certainly cannot obtain unless the fraud remained undiscovered, or the mental incapacity continued, until after such fruits had been put beyond the power or control of the plaintiff.—STRODDER V. SOUTHERN GRANITE CO., Ga., 27 S. E. Rep. 174.

23. CORPORATIONS.—Where the manual labor performed by one who was employed by a corporation as a general manager and employer of labor was merely incidental to his connection with the company, and the incentive thereto was his interest as a sharer in expected profits, the labor does not come within the intent or scope of the statutes of the State of Washington creating liens for wages. — ADDISON V. PACIFIC COAST MILLING CO., U. S. C. C., D. (Wash.), 79 Fed. Rep. 459.

24. CORPORATIONS — Corporate Existence. — The plaintiff sued as a corporation. The defendants, in their answer, specifically denied the corporate existence of plaintiff: Held, that the answer in this respect stated a defense, and cast upon the plaintff the burden of proving its corporate existence.—DAVIS V. NEBRASKA NAT. BANK, Neb., 70 N. W. Rep. 963.

25. CORPORATIONS—Filing Reports—Directors.—Pub. Acts 1885, No. 232, § 12, requiring corporations to make annual reports, and making directors, for willful neglect thereof, liable for "all the debts of such corporation, and subject to a penalty for each day during the pendency of such neglect," renders them liable for debts contracted after and pending the default.—BANK OF SAGINAW V. PEIRSON, Mich., 70 N. W. Rep. 901.

26. CORPORATIONS—Fraud of Promoters.—Promoters of a corporation organized to sell a patented article in a certain territory, who procured subscriptions by falsely representing that the cost of said territorial rights was $9,000, concealing the fact that they were to have one-half of that amount, are liable to the corporation for the profits so made.—COOK V. SOUTHERN COLUMBIAN CLIMBER CO., Miss., 21 South. Rep. 795.

27. CORPORATIONS — Indorsement of Note — Ultra Vires.—The act of a corporation, formed solely to manufacture cotton-seed oil and to gin and bale cotton, in indorsing a firm note before it was discounted by the payee, was *ultra vires;* and the corporation, having received no part of the proceeds of the note, was not liable to the payee.—SOUTH TEXAS NAT. BANK V. LAGRANGE OIL-MILL CO., Tex., 40 S. W. Rep. 328.

28. CORPORATIONS—Lease.—Where a mining corporation executed a lease of its property for five years, by which the lessee covenanted to organize a "leasing company," to which the lease was to be assigned, stipulating that the stock of the new corporation was first to be offered to the stockholders of the lessor, the new corporation thus organized was not identical with the old, although the greater part of the stock was subscribed for by the stockholders of the old corporation, and the statutory liens of persons who have furnished supplies to the new corporation while operating the mines under the lease do not attach to the title of the lessor as owner of the mine.—UNITED MINES CO. V. HATCHER, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 517.

29. CORPORATIONS—Receivers.—The appointment of a receiver of an insolvent corporation cannot be prevented by a previous assignment for benefit of creditors.—MILAM COUNTY, ETC. ALLIANCE V. TENNENT-STRIBLING SHOE CO., Tex., 40 S. W. Rep. 331.

30. CORPORATIONS — Stock — Dissolution.—That one person becomes the owner of a majority of all of the shares of stock of the corporation does not work a dissolution of the corporation or does not necessarily destroy its identity or individuality as a business concern. Property conveyed to the corporation does not become the property of such person individually.—HARRINGTON V. CONNOR, Neb., 70 N. W. Rep. 911.

31. COUNTIES—Powers of Commissioners.—Counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and such grant of powers must be strictly construed.—MORTON V. CARLIN, Neb., 70 N. W. Rep. 966.

32. COURTS — Jurisdiction — Injunction. — A court which has jurisdiction of the parties may enjoin a threatened trespass on land lying in another county.—CLAD V. PAIST, Penn., 37 Atl. Rep. 194.

33. CRIMINAL LAW — Abortion.—A person who furnishes to a pregnant woman drugs to produce an abortion is properly indicted under Pen. Code, art. 641, with "administering" such drugs as a principal, not under section 642, providing that one furnishing means to procure an abortion "is an accomplice;" since the

woman was not a principal, and he who furnished her the drugs could not therefore be an accomplice.—MOORE v. STATE, Tex., 40 S. W. Rep. 287.

34. CRIMINAL LAW — Burglary. — The removing of props from a warehouse door, in order to open and enter, is a breaking; but, if a door or window be partly open, it is not a breaking to push it further open.—ROSE v. COMMONWEALTH, Ky., 40 S. W. Rep. 245.

35. CRIMINAL LAW—Extradition — Sufficiency of Indictment—Conflict of Laws.—A requisition for the return of a fugitive from justice cannot be denied, when the indictment or affidavit of which a copy is attached to the requisition would be held sufficient by the courts of the State where the offense was committed, though it would not be held good by the courts of the State where the accused has taken refuge.—WEBB v. YORK, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 616.

36. CRIMINAL LAW—Homicide.—Whoever kills another while engaged in the perpetration or attempted perpetration of any rape, robbery, arson, or burglary, is by section 8, Cr. Code, declared to be guilty of murder in the first degree.—HENRY v. STATE, Neb., 70 N. W. Rep. 924.

37. CRIMINAL LAW — Witnesses—Oath.—An oath administered by an interpreter in the presence and under the immediate direction of the court is valid, though it is not repeated by the clerk to the interpreter every time he is called on to administer it, but only at the beginning of the examination.—COMMONWEALTH v. JONGRASS, Penn., 37 Atl. Rep. 207.

38. CRIMINAL PRACTICE—Unlawful Assembly. — An indictment alleging that defendants unlawfully met in a certain county, with intent, by violence, to deprive a certain person of his right to have a dance at his house, sufficiently laid the venue, without averring that the house was in that county; the unlawful meeting being the gist of the offense.—FOLLIS v. STATE, Tex., 40 S. W. Rep. 277.

39. CRIMINAL TRIAL—Jury—Challenges.—When two or more persons are jointly tried for a felony, and each insists upon having the full number of peremptory challenges to jurors to which he would be entitled if tried alone, it is the duty of the judge, upon the request of the accused, made when the first juror is put upon them, to determine at once the total number of such challenges which will be allowed to the accused.—CUMMING v. STATE, Ga., 27 S. E. Rep. 177.

40. CRIMINAL TRIAL — Witnesses—Impeaching.—The State, on a trial for murder, having asked defendant's witness on cross-examination whether he had not stated that, after an investigation, he was convinced that defendant killed deceased, cannot rebut his negative answer.—STATE v. DAVIDSON, S. Dak., 70 N. W. Rep. 879.

41. DEED—Condition Subsequent.—A condition in a deed that the grantee shall provide for the grantor for life, and that, if he fails, the instrument shall be void, is a condition subsequent vesting title in the grantee until defeated by non-performance of the condition and a claim of forfeiture by the grantor.—SHUM v. CLAGLORN, Vt., 37 Atl. Rep. 236.

42. DEEDS—Misdescripton.—The fact that a deed erroneously describes the land conveyed as part of a certain grant does not render it any less a deed to the land therein otherwise unmistakably described.—SWENSON v. MYNAIR, U. S. C. C. of App., Fifth Circuit, 79 Fed. Rep. 608.

43. DEEDS—Parol Testimony.—Where land was conveyed by a daughter to her stepfather, under a verbal agreement by the grantee to sell, and pay the proceeds to the grantor's mother, as a gift from the grantor, it was error to subject the proceeds of the land to a debt of the grantee created before the deed was executed.—WOOLFOLK v. EARLE, Ky., 40 S. W. Rep. 247.

44. DEPOSITIONS—Notice.—The law requiring the notice to take depositions to state the residence of the witness is substantially complied with by an indorsement of his residence on the back of the interrogatories served on the attorneys for the opposite party.—FIDELITY MUT. LIFE ASSN. v. HARRIS, Tex., 40 S. W. Rep. 341.

45. EQUITY — Contract Debt. — An independent suit against a railroad receiver to recover a simple contract debt owing by the receiver is not sustainable in equity.—NASH v. INGALLS, U. S. C. C., S. D. (Ohio), W. D., 79 Fed. Rep. 510.

46. EQUITY—Marshaling Assets. — Equity will require a creditor having a lien upon two funds, upon one of which alone another creditor has a subordinate lien, to first exhaust the fund to which he alone is entitled.—NORFOLK STATE BANK v. SCHWENK, Neb., 70 N. W. Rep. 970.

47. ESTOPPEL IN PAIS. — The mere fact that a wife who sells land belonging to her separate estate allows the note for the price to be made payable in the alternative to her or her husband, and permits the latter to have the custody thereof, does not estop her to assert her title to the note as against the husband's creditors, who have garnished, and obtained judgment against the maker, and are seeking to be subrogated to their debtor's alleged vendor's lien. — CORRY v. JONES, Ala., 21 South. Rep. 815.

48. EVIDENCE — Manifestations of Pain. — Whenever bodily suffering is material to be proved, expressions or complaints, made at the time, which are the natural and instinctive manifestations of pain and suffering, are competent evidence as part of the *res gestæ*, and may be testified to and described by any person in whose presence they were uttered. Distinction noted between such complaints and the mere narration of past symptoms or simply descriptive statements, which furnish no evidence of the existence of suffering except assertion of the party. — WILLIAMS v. GREAT NORTHERN RY. CO., Minn., 70 N. W. Rep. 860.

49. EVIDENCE — Medical Books.—Medical books cannot be read to the jury as independent evidence of the opinions therein expressed. Therefore, in an action against a railroad company to recover for personal injuries, in which it was contended that the plaintiff sustained a severe shock, which affected the nerves of the spine, and had produced a dangerous and progressive disease of the spinal cord, it was error to permit plaintiff to read to the jury certain extracts from a medical book relating to such diseases, especially as some of the medical experts stated that it was not regarded as an authority, and the fact in question was susceptible of proof by competent living physicians.—UNION PAC. RY. CO. v. YATES, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 584.

50. EXECUTION — Claims by Third Person. — Where land was levied on under an execution issued from a judgment rendered in an attachment case against a non-resident, and a claim filed, the claimant did not, by admitting at the trial of the claim case that the land levied on was *prima facie* subject to that execution, necessarily admit that the defendant in attachment was in possession of the land when the attachment purported to have been levied, or that the alleged levy of that process was valid and legal. — NEW ENGLAND MORTGAGE & SECURITY CO. v. WATSON, Ga., 27 S. E. Rep. 160.

51. FALSE IMPRISONMENT — Malicious Prosecution—Evidence. — Where one is arrested under a warrant which is good on its face, and prosecuted for the offense charged, an action for false imprisonment will not lie. — TRYON v. PINGREE, Mich., 70 N. W. Rep. 905.

52. FEDERAL COURTS—Assignment for Creditors.—A creditor may in some cases maintain an action to enforce execution of an assignment for the benefit of creditors without making the other creditors parties, either plaintiff or defendant, though their names are set out in the assignment. And the court has jurisdiction although the effect would be to oust it of jurisdiction if they were made parties. — PUTNAM v. TIMOTHY DRY-GOODS & CARPET CO., U. S. C. C., E. D. (Tenn.), 79 Fed. Rep. 454.

53. FEDERAL COURTS — Effect of State Decisions. — The rule that the decision of the highest court of a State passing upon the validity of a State statute under the State constitution is binding upon the federal courts will not be applied in cases involving rights which arose under the statute prior to the decision of the State court; and the federal court will exercise an independent judgment. — JONES v. GREAT SOUTHERN FIREPROOF HOTEL CO., U. S. C. C., S. D. (Ohio), 79 Fed. Rep. 477.

54. FEDERAL COURTS—Eminent Domain.—As to mere questions of procedure in the condemnation of property, or of conflict between the statute authorizing the condemnation, or the proceedings thereunder, and the constitution of the State, the decision of the highest court of the State is conclusive.—LONG ISLAND WATER-SUPPLY CO. v. CITY OF BROOKLYN, U. S. S. C., 17 S. C. Rep. 718.

55. FEDERAL COURTS—Habeas Corpus — State Courts. —While the general rule is that persons prosecuted in State courts will not be released by the federal courts on writs of *habeas corpus*, but will be left to reach the Supreme Court of the United States by writ of error, yet a federal court has the power to do so if special circumstances should require: possessing a discretion in the matter which must be governed by the facts in each case. — IN RE GRICE, U. S. C. C., N. D. (Tex.), 79 Fed. Rep. 627.

56. FRAUDS, STATUTE OF—Promise to Pay Debt of Another.—A promise to pay the debt of a third person, arising out of some new consideration, of benefit to the promisor, or harm to the promisee, moving to the promisor, either from the promisee or the original debtor, is not within the statute of frauds, although the original debt still subsists and remains unaffected by said agreement. — CRAFT v. KENDRICK, Fla., 21 South. Rep. 803.

57. FRAUDULENT CONVEYANCE—Preferences. — An insolvent debtor may lawfully secure a portion of his creditors to the exclusion of the others, if in so doing he acted in good faith and without a fraudulent intent. —SMITH v. BOWEN, Neb., 70 N. W. Rep. 949.

58. FRAUDULENT CONVEYANCE TO WIFE. — A deed from an insolvent married man to his wife, founded upon no other consideration than a contract previously made between them, by the terms of which she was to perform the ordinary household duties of a wife, for which he was to pay her a stipulated sum per annum, is, as to creditors of the husband whose claims were in existence at the time of the execution of the deed, voluntary, and therefore void.—LEE v. SAVANNAH GUANO CO., Ga., 27 S. E. Rep. 159.

59. GARNISHMENT — Protection of Garnishee.—A garnishee who, in his answer, admits an indebtedness on open account to a debtor whose effects are sought to be reached by the garnishment, will not, as against a third person who is true owner of such account, be protected by a judgment rendered in the garnishment proceeding, if, at the time of answering, the garnishee knew the account actually belonged to such third person, or had knowledge of facts naturally suggesting an inquiry which would easily have led to a discovery of the truth. — CHURCHMAN v. ROBINSON, Ga., 27 S. E. Rep. 164.

60. HOLIDAYS.—Code, art. 18, § 9, establishing February 22d as a legal holiday, and providing that it shall be treated as Sunday only as regards the presenting of bills of exchange, checks, etc., does not make such day a "*dies non*," and an act done on it is as effective as if done on any other day.—HANDY v. MADDOX, Md., 37 Atl. Rep. 222.

61. HUSBAND AND WIFE—Conveyances—Fraud.—It is the general rule that fraud will not ordinarily be presumed, but must be established by the party who has alleged it. The rule does not apply in a contest between a wife and creditors of her husband, in respect to transactions involving the transfer of property from the husband to the wife. In such a contest there is a presumption against her, which she must overcome by affirmative proof. She must show by the preponderance of the evidence the *bona fide* character of the transaction.—KIRCHMAN v. CORCORAN, Neb., 70 N. W. Rep. 916.

62. HUSBAND AND WIFE—Gifts—Trust.—Where a husband purchases real estate with his own funds, and causes the legal title thereof to be conveyed to his wife, the presumption is that the husband intended such real estate as a gift to his wife. — KOBARG v. GREDER, Neb., 70 N. W. Rep. 921.

63. HUSBAND AND WIFE — Married Woman's Deed.— No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto, required by Const. art. 10, § 6, was not proved and recorded until after her death. — GREEN v. BENNETT, N. Car., 27 S. E. Rep. 142.

64. INJUNCTION—Judgment — Certiorari.—Injunction will not lie to restrain the enforcement of a void judgment which can be reviewed by *certiorari* when the bill for injunction is filed.—SAN ANTONIO & A. P. RY. CO. v. GLASS, Tex., 40 S. W. Rep. 339.

65. INSANE PERSONS—Execution Sale.—Where a judgment creditor, knowing that his debtor was then insane, purchased the latter's land at execution sale for an inadequate consideration, which he credited on the judgment, the sale is voidable, and may be set aside on direct attack.—HOUGHTON v. RICE, Tex., 40 S. W. Rep. 849.

66. INSOLVENCY—Preferences.—It cannot be held, as a matter of law, that because a technically insolvent merchant or trader suffers an action to be commenced against him upon a claim against which he has no defense, by creditors who know him to be technically insolvent, and allows a judgment to be entered and docketed against him for want of answer, which judgment becomes a lien upon real property, the debtor intended to permit the judgment creditors to obtain an unlawful preference.—BEAN v. SCHEFFER, Minn., 70 N. W. Rep. 855.

67. INSURANCE.—In order that a plaintiff in a suit against an insurance company may recover an attorney's fee as part of his costs, it must appear that the judgment is based upon a policy or contract of insurance, the policy must have been written upon real property, and be a contract of indemnity against loss by fire, tornado, or lightning, and the loss must have occurred without criminal fault on the part of the insured or his assigns.—EDDY v. GERMAN INS. CO., Neb., 70 N. W. Rep. 947.

68. INSURANCE—Abatement — Waiver.—By denying, in an answer, any liability for loss under an insurance policy, the insurer does not waive its right to plead in abatement that under the terms and conditions of the policy as to payment the action has been prematurely brought.—LA PLANT v. FIREMAN'S INS. CO. OF BALTIMORE, Minn., 70 N. W. Rep. 856.

69. INSURANCE—Credit Guaranty.—A credit guaranty policy insured against loss by the insolvency of debtors owing for "merchandise sold between April 1, 1893, and March 31, 1894," and provided that the policy should "expire on March 31, 1894." It further provided that final proofs of loss must be presented within 90 days after the expiration of the policy, and that no loss should be payable unless included in such proofs, except that, should the policy be renewed on expiration, losses occurring after such expiration on sales made during its existence were payable: Held, that losses occurring after the expiration of the policy on sales made during its existence were payable, though the policy was not renewed, if final proof of loss was made as required.—SLOMAN v. MERCANTILE CREDIT GUARANTEE CO. OF NEW YORK, Mich., 70 N. W. Rep. 886.

70. INTOXICATING LIQUORS.—An indictment for selling vinous liquors without license was not bad because it unnecessarily alleged that the liquor was sold to be drunk, and was drunk on the premises.—COMMONWEALTH v. HELBACK, Ky., 40 S. W. Rep. 245.

71. INTOXICATING LIQUOR—Civil Damage Laws.—An action by a widow for damage suffered in consequence of the furnishing to her deceased husband of intoxicating liquors cannot be defeated by proof that such liquors were furnished by the defendant, a licensed saloon keeper, with the knowledge and consent of the plaintiff.—KLIMENT v. CORCORAN, Neb., 70 N. W. Rep. 910.

72. INTOXICATING LIQUORS—Illegal Sale.—A conviction for illegal sale of liquor was erroneous where defendant purchased the liquor for another person with money furnished by the latter, and was not interested in the sale, as the seller's agent or otherwise.—PHILLIPS v. STATE, Tex., 40 S. W. Rep. 270.

73. INTOXICATING LIQUORS—Illegal Sale.—Where an indictment charged a sale of liquor to A and S, and the evidence was conflicting as to whether each paid a part of the price, or whether A paid the whole, borrowing a part of the money from S, an instruction that, if A bought the liquor, defendant could not be convicted, was properly refused; the same being sufficiently covered by a charge to acquit unless defendant sold to A and S, as charged.—CARTER v. STATE, Tex., 40 S. W. Rep. 267.

74. JUDGMENT LIEN.—The lien of a judgment of the district court attaches to all the lands of the debtor within the county where the judgment was rendered, whether then owned by him or subsequently acquired.—DUELL v. POTTER, Neb., 70 N. W. Rep. 932.

75. JUDICIAL SALES—Enforcement.—A court of equity has power to make and enforce an order requiring a purchaser of property at a sale by its master to pay the amount of his bid into the court, but before making such order the court must confirm the sale.—ALLRED v. MCGAHAGAN, Fla., 21 South. Rep. 802.

76. LANDLORD AND TENANT—Abandonment of Leased Premises.—A landlord is not, upon the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may, at his election, suffer the premises to remain vacant, and recover his rent for the remainder of the term, by means of an action on the lease.—MERRILL v. WILLIS, Neb., 70 N. W. Rep. 914.

77. LIFE INSURANCE—Conflict of Laws.—Language in a life insurance policy designating the beneficiary must, subject to limitations of the statute or charter as to who may be designated, be regarded as the language of the insured alone, and is to be treated as of a testamentary character, and should receive as nearly as possible the same construction as if used in a will under the same circumstances. Therefore, under a policy, issued in Ohio, payable to the heirs of the insured, who was domiciled in New York, and all the possible objects of whose bounty lived there, the court must determine by the law of New York who are his heirs.—KNIGHTS TEMPLARS & MASONIC MUT. AID. ASSN. v. GREENE, U. S. C. C., S. D. (Ohio), 79 Fed. Rep. 461.

78. LIMITATIONS—Partial Payments.—In order to prevent the running of the statute of limitations, a partial payment must have been made by the debtor himself, or for him by his authority, or subsequently ratified, if made in his name, without his authority.—PFENNINGER v. KOKESCH, Minn., 70 N. W. Rep. 867.

79. LIMITATIONS—Payment of Interest.—Note in suit is sufficiently identified as that on which payment of interest was made within six years, so as to prevent bar of the statute, though plaintiff held two notes of defendant, and the receipt for the payment recited merely that it was "on account of interest on note," plaintiff's evidence that payment of that date was for interest on note in suit being uncontradicted.—WRIGHT v. JORDAN, Penn., 37 Atl. Rep. 196.

80. LIMITATION OF ACTIONS—Foreign Receivers.—A receiver appointed and residing in another State cannot sue in Texas; and hence, where a suit was brought by such a receiver in Texas, solely by virtue of the foreign appointment, and the insolvent filed an amended complaint on the cessation of the receivership, limitations ran against the cause of action until the amended complaint was filed.—KELLOGG v. LEWIS, Tex., 40 S. W. Rep. 323.

81. MALICIOUS PROSECUTION—Defenses.—The defendant in an action for malicious prosecution will not be permitted to urge the insufficiency of the complaint on which he caused the plaintiff's arrest as a defense to the action.—MINNEAPOLIS THRESHING-MACH. CO. v. REGIER, Neb., 70 N. W. Rep. 934.

82. MANDAMUS — Executive Officers.—The governor can maintain *mandamus* against the State auditor to compel the performance of ministerial duties prescribed by statute, both under the general law and by virtue of Code, § 3320, subsecs. 1, 2, requiring the governor to supervise all executive officers, and see that their duties are performed, "or in default thereof apply such remedies as the law allows."—RUSSELL v. AYER, N. Car., 27 S. E. Rep. 133.

83. MANDAMUS — Parties.—When *mandamus* proceedings are instituted to redress a private wrong or enforce a private right, the party beneficially interested should be named as relator.—VAN HORN v. STATE, Neb., 70 N. W. Rep. 941.

84. MECHANICS' LIENS—Scope of Employment.—Manual labor in the reconstruction of an hotel building is not within the scope of an employment of one to act as clerk and book-keeper, and to "make himself generally useful," during such reconstruction, and hence does not entitle the employee to a laborer's lien.—NASH v. SOUTHWICK, N. Car., 27 S. E. Rep. 127.

85. MORTGAGES — Payment — Subrogation.—A mortgagor's father paid off a balance on the mortgage, and took an assignment. The mortgagor procured a new loan from A, whose agent, B, had been assured by the mortgagor's father that the old mortgage had been paid. When the A mortgage matured, it was paid with money borrowed from another lender, also represented by B, who found no incumbrances subsequent to the A mortgage, and the A mortgage was released: Held that, since the last mortgagee had advanced money to pay off the A mortgage, believing that she was to receive a valid first lien on the property, she was entitled to be subrogated to A's rights under the released mortgage, as against which the father, as assignee, was estopped from setting up the old mortgage.—PALMER v. SHARP, Mich., 70 N. W. Rep. 903.

86. MORTGAGE — Signature of Wife.—A purchase-money mortgage executed by a husband is valid without the signature of the wife.—STANLEY v. JOHNSON, Ala., 21 South. Rep. 823.

87. MUNICIPAL CORPORATIONS—False Imprisonment.—A city is not liable for the trespass committed by its officers in enforcing a void judgment for a fine where the charge was an offense against the general law of the State.—FOX v. CITY OF RICHMOND, Ky., 40 S. W. Rep. 251.

88. MUNICIPAL CORPORATION—Ordinances.—An ordinance of a city authorizing the council thereof, by resolution, to require the construction of sidewalks in front of and adjacent to any premises situated upon any street, and which provides for notice to property owners by the publication of such resolution, is not directory merely, but mandatory; and a strict compliance therewith is essential in order to confer upon the city authority to charge private property with the cost of such improvements.—IVES v. CITY OF OMAHA, Neb., 70 N. W. Rep. 961.

89. MUNICIPAL IMPROVEMENTS — Change of Grade—Damages.—In the absence of any express statutory or constitutional authority, an action will not lie in this State against a municipal corporation for consequential injuries to property caused by a change of the legally established grade, where such grading is done in a proper manner: Held, however, that Sp. Laws 1885, ch. 5, is applicable to property situate in the city of Minneapolis, and authorizes the assessment of damages in such case in the manner therein provided.—ABEL v. CITY OF MINNEAPOLIS, Minn., 70 N. W. Rep. 851.

90. PARTNERSHIP — Fraudulent Conveyance.—A defendant was a member of three successive firms, the first two of which had sold out to the third; and his codefendant was a member of the third firm only, and had no interest in the other firms. Loans had been made to the first two firms and to the first-mentioned defendant individually, for which notes of the third firm had been given by him without the knowledge or consent of his codefendant, and without any new consideration for the assumption by such firm of the debts of the other firms: Held, that a transfer by the third firm, while insolvent, of its assets, to satisfy such loans was fraudulent as to its creditors.—MUSKEGON VALLEY FURNITURE CO. v. PHILLIPS, Ala., 21 South. Rep. 822.

91. PARTNERSHIP — Receivers — Appointment.—Receivers for a partnership should not be appointed on application by members thereof, except on a showing that the parties cannot or will not arrange matters in controversy themselves, that there is some abuse of partnership rights and property, and some fraud or mismanagement or violation of partnership duties by the partner against whom relief is asked.—WEBB v. ALLEN, Tex., 40 S. W. Rep. 342.

92. PARTNERSHIP—Retiring Partner.—Where no public notice was given of the dissolution of a partnership, the retiring partner was liable for a debt arising from a transaction immediately after the dissolution, between the other partner and one who knew they had been doing business as partners, and believed they were partners at the time, and that he was extending credit to the partnership.—ALEXANDER v. HARKINS, N. Car., 27 S. E. Rep. 120.

93. PARTNERSHIP—What Constitutes.—Defendant authorized plaintiff to solicit loans for him, the commissions being divided between them, and a second mortgage to defendant being taken to secure such commissions. Each application for a loan, when accepted by defendant, was returned with a separate letter of instructions, and the sum necessary to make the loan; and when it was made all papers were sent to defendant. The parties lived in different States, had no partnership name, and each carried on other business: Held that, as between themselves, there was no partnership.—GRIGSBY v. DAY, S. Dak., 70 N. W. Rep. 881.

94. PAYMENT — Release of Sureties.—Where an agent authorized to collect a judgment accepts a check in payment, knowing that there is money in the bank to pay it, and notifies his principal, who is the real party in interest, though another is the nominal creditor, and, before presenting the check, by collusion permits the deposit to be exhausted by a check previously given to the principal for another debt, but dishonored for lack of funds, the judgment will be considered paid, so that it may not be enforced against sureties for the debt for which it was obtained.—KALLANDER v. NEIDHOLD, Mich., 70 N. W. Rep. 892.

95. PRINCIPAL AND AGENT — Authority.—Ostensible authority to act as agent may be conferred if the party to be charged as principal, affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust an act upon such apparent agency.—PHOENIX INS. CO. OF HARTFORD, CONN. v. WALTER, Neb., 70 N. W. Rep. 938.

96. PRINCIPAL AND AGENT—Special Agent — Powers—Liability of Principal.—Commission merchants who specially authorized one not their agent to buy cotton at a certain place, of a designated person, were not liable for cotton of equal value and quality purchased by him from other persons in a different locality.—ROBINSON MERCANTILE CO. v. THOMPSON, Miss., 21 South. Rep. 794.

97. RAILROAD COMPANY — Express Messenger—Contract Exempting from Liability.—A contract whereby a passenger on a railroad train agrees not to hold the railroad company liable for injury to him caused by the negligence of the company or its servants is void, as against public policy, and this rule applies to an express messenger carried by a railroad company in a special car, under a contract with the express company.—VOIGHT v. BALTIMORE, ETC. RY. CO., U. S. C. C., S. D. (Ohio), 79 Fed. Rep. 561.

98. RAILROAD COMPANY—Injury to Stock.—A railroad company is negligent in running its trains in the night time at such rapid speed that it is impossible, by ordinary means and appliances, to stop the train, and prevent injury to stock on the track, within the distance in which the stock could be seen by the aid of the headlight.—LOUISVILLE, ETC. CO. v. KELTON, Ala., 21 South. Rep. 819.

99. RAILROAD COMPANY — Negligence at Street Crossing.—The rights and duties of railroad companies and of travelers on highways crossing their tracks are mutual and reciprocal, and no greater degree of care is required of the one than of the other; the care to be exercised by each being such as an ordinarily prudent man would exercise under similar circumstances.—TEXAS & P. RY. CO. v. CODY, U. S. S. C., 17 S. C. Rep. 703.

100. RAILROAD COMPANY — Street Railroads — Negligence.—Plaintiff, in crossing a street traversed by street cars on double tracks, did not look for cars after starting to cross, and went on the second track six or seven feet in front of a slowly moving car, which it was impossible for the motorman to stop in time to avoid an accident, and which plaintiff would have seen had he looked: Held, that he could not recover for injuries caused by being struck by such car.—NUGENT v. PHILADELPHIA TRACTION CO., Penn., 37 Atl. Rep. 206.

101. RAILROAD MORTGAGES—Receivers — Preferential Claims.—A claim for damages for death by the negligence of a railroad company occurring before the appointment of a receiver, is not a preferential claim, which is entitled to be paid out of the income or the *corpus* of the mortgaged property, to the exclusion of the mortgage debt.—VEATCH v. AMERICAN LOAN & TRUST CO., U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 471.

102. REMOVAL OF CAUSES.—A federal corporation sued in a State court may have the cause removed to a federal court upon the ground that it was created by act of congress, though that fact does not appear from the complaint.—TEXAS & P. RY. CO. v. BARRETT, U. S. S. C., 17 S. C. Rep. 707.

103. REMOVAL OF CAUSES—Admission of Territory as State.—The right to remove into the federal courts causes which were pending in the territorial courts of Utah at the time of its admission into the Union did not depend on the judiciary act of March 3, 1887, but rested entirely on the provisions of the enabling act, and of the State constitution adopted pursuant thereto, for the special purpose of removing into the federal courts causes pending in the territorial courts, when such courts should cease to exist. And while the constitution of Utah provides that causes of which the United States courts would not have had exclusive jurisdiction shall be removed only upon petition or motion made under and in accordance with the act or acts of congress of the United States, this does not mean that the application for removal must be made before pleading by the defendant, or at any specified time before trial.—MCCORNICK v. WESTERN UNION TEL. CO., U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 449.

104. REMOVAL OF CAUSES — Appearance.—The filing, by defendant, of a petition to remove the cause into a federal court, disclaiming any intention to submit to the jurisdiction of the State court, is not an appearance in the action waiving defects in the service or return of summons.—HAWKINS v. PEIRCE, U. S. C. C., D. (Ind.), 79 Fed. Rep. 452.

105. SALES — Executory Contract to Manufacture.—Where specific goods are to be manufactured to order under an executory contract to purchase when finished, no title passes until they are finished and delivered.—HEISER v. MEARS, N. Car., 27 S. E. Rep. 117.

106. SALES — Rescission.—Assuming that a contract for the sale of machinery authorized the buyers to rescind if they were in fact dissatisfied with the machinery after a fair trial, although there was no reasonable ground for such dissatisfaction, the fact that they used the machinery for 3 1-2 years after they claimed to have notified the seller of their election to rescind, and then sold it, and appropriated the proceeds to their own use, constituted an abandonment of their right of rescission, and remitted them to their right to damages for alleged breach of the warranties. It is immaterial that the sale took place after the seller instituted his suit for the contract price, as he had the right to show, as an answer to the plea of rescission, that by a course of conduct which began before the suit was filed, and continued thereafter, the defendants had manifested an intention to abandon their alleged right of rescission.—BUCKSTAFF v. RUSSELL & Co., U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 611.

107. SALE BY HUSBAND TO WIFE — Consideration.—The signing by a wife of a mortgage upon the homestead of herself and husband, the legal title to which is in him, to raise money with which to pay his debt, is such a valuable consideration, if otherwise sufficient, as will support a sale of personal property of the husband to the wife.—SLOAN v. VAN BUSKIRK, Neb., 70 N. W. Rep. 948.

108. SLANDER OF TITLE.—Plaintiff in an action for slander of title must show the falsity of the words published, the malicious intent with which they were uttered, and pecuniary loss.—CARDON v. MCCONNELL, N. Car., 27 S. E. Rep. 109.

109. SPECIFIC PERFORMANCE—Parol Contract. — Specific performance of a parol agreement by an heir relinquishing his share in realty in consideration of the release of his indebtedness to the estate and other indebtedness to his co-heirs will be enforced as against his descendants, where, in reliance on the agreement, and with his acquiescence until his death, 25 years later, the other heirs entered and improved the realty, and one of them bought and improved the shares of the others.—MOONEY v. ROWLAND, Ark., 40 S. W. Rep. 259.

110. STATUTE—Amendment—Constitutional Law.—An act of the legislature which is clearly amendatory of an existing statute is unconstitutional when such amendatory act in no way mentions or describes that of which it is amendatory. — BOARD OF EDUCATION OF CITY OF AURORA v. MOSES, Neb., 70 N. W. Rep. 946.

111. STATUTES—Retroactive Operation — Attachment. —The Colorado act of 1887 amending the statute relative to attachments by dropping out one of the grounds of attachment, does not have a retroactive operation, so as to affect pending attachments.—NATIONAL BANK OF COMMERCE v. RIETHMANN, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 582.

112. SUBROGATION.—The right of subrogation must in every case rest upon some recognized subject of equitable cognizance.—CHICAGO LUMBER CO. v. ANDERSON, Neb., 70 N. W. Rep. 919.

113. TRUST — Resulting Trusts. — Where a husband buys land in his own name with his separate means, or with community property, his mere intention, at the time of payment, to hold the land for his wife's benefit, does not create a resulting trust in her favor.—JOHNSON v. FIRST NAT. BANK OF SULPHER SPRINGS, Tex., 40 S. W. Rep. 334.

114. TRUST—Resulting Trusts—Principal and Agent.—Where one agrees to loan money to the devisee of a mortgagor, and with it to bid in the land for the devisee at foreclosure sale, and take title in his own name as security for the loan, and pursuant thereto bids in the land in his own name, a trust results in favor of the devisee. — HEBRON v. KELLY, Miss., 21 South. Rep. 799.

115. USURY—Commission to Third Person.—A loan of money made in consideration of the maximum legal rate of interest and one-half of the commissions charged by a third person for negotiating the loan, is usurious; and, under such circumstances, it is immaterial whether the third person is the agent of the lender, or of the borrower, or of both. — POTTLE v. LOWE, Ga., 27 S. E. Rep. 145.

116. USURY — Recovery of Penalty. — In an action against a national bank to recover the penalty for taking usury, it appeared that the transactions between the plaintiff and the bank consisted of a large number of loans evidenced by notes, many of which had been from time to time renewed: Held, that evidence of the whole course of transactions was material in order to trace the different debts and the interest reserved on each, although some transactions were not pleaded as usurious.—FIRST NAT. BANK OF TOBIAS v. BARNETT, Neb., 70 N. W. Rep. 937.

117. VENDOR AND PURCHASER — Contract.—When the terms of a written contract are in any respect doubtful or uncertain, or if the contract contains no provisions on a given point, or if it fails to define with certainty the duties of the parties with respect to a particular matter or in a given emergency, and the parties to it have by their conduct placed a construction upon it which is reasonable, such construction will be adopted by the court, upon the principle that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract. — SHOUSE v. DOANE, Fla., 21 South. Rep. 807.

118. VENDOR AND PURCHASER—Contract.—Complainant wrote its agent that it would sell defendants "surface rights" of a certain 40 acres of land on certain terms of payment. The agent wrote defendants that "we will sell you surface rights" on different terms of payment, and that on receipt of the cash payment complainant would make a contract accordingly. Defendants accepted the offer, and remitted $1,000. Complainant then sent defendants a contract, which provided that the former should have the right to enter on the land to explore for ores and carry on the business of mining; and, for such purpose, to take so much of the land, and for such time, as it should deem expedient, paying defendants damages therefor: Held that, giving to the term "surface rights" the meaning in which it was used in the offer to sell, the contract tendered was not in accordance therewith. — KEWEENAW ASSN. v. FRIEDRICHS, Mich., 70 N. W. Rep. 896.

119. WILLS — Designation of Devisees. — A devise to "my spinster or unmarried nieces" includes those nieces who, at testator's decease, were widows, as well as those who had never married.—IN RE CONWAY'S ESTATE, Penn., 37 Atl. Rep. 204.

120. WILL — Devise — Rule in Shelley's Case.—Under the rule in Shelley's Case, a devise to a person "during his natural life, and at his death to his bodily heirs," confers on him a fee-simple estate. — CHAMBLEE v. BROUGHTON, N. Car., 27 S. E. Rep. 111.

121. WILLS — Effect of Renunciation.—Renunciation by widow, and election to take against the will, is equivalent to her death for purpose of distribution to testator's children, under will giving estate in trust for support of wife and children, and during her life, and after her death to their support, in the discretion of the trustees, till they are of age or marry, and, when all the children arrive at age or marry, to divide the estate among the children, and, in the event of no child or issue thereof, then to divide the estate among testator's brothers and sisters.—RANDALL v. RANDALL, Md., 37 Atl. Rep. 209.

122. WITNESSES — Husband and Wife. — Under Code Cr. Proc. 1895, art. 775, forbidding husband and wife to testify against each other "except in a criminal prosecution for an offense committed by one against the other," a wife is not a competent witness against her husband on his trial for an abortion committed on her prior to their marriage. — MILLER v. STATE, Tex., 40 S. W. Rep. 313.